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# Promises Not to be Kept: The Illusory Newsgatherer's Privilege in California

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# PROMISES NOT TO BE KEPT: THE ILLUSORY NEWSGATHERER'S PRIVILEGE IN CALIFORNIA

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## I. INTRODUCTION

Although the United States Supreme Court observed nearly twenty years ago that "news gathering is not without its First Amendment protections,"<sup>1</sup> the Court has been loathe to interpret the Constitution in a way that provides the press with special rights.<sup>2</sup> Journalists may serve as representatives of the citizenry,<sup>3</sup> but they are entitled to no greater access to government information<sup>4</sup> and facilities<sup>5</sup> than other members of the public. Despite this denial of preferred status in gathering news,<sup>6</sup> reporters are professionally obligated to provide readers, listeners and viewers with "full access to the day's intelligence."<sup>7</sup> To gather this information, they have found it necessary to promise anonymity to sources<sup>8</sup> and have sought judicial recognition of a right to make, and keep, these agreements.<sup>9</sup>

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1. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I.

2. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-22, at 976 (2d ed. 1988).

3. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573-74 (1980).

4. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974).

5. *See Houchins v. KQED*, 438 U.S. 1, 11 (1978).

6. *See Pell*, 417 U.S. at 834; *Branzburg*, 408 U.S. at 684-85. Former Supreme Court Justice Potter Stewart urged the recognition of a preferred status for journalists, Potter Stewart, "Or of the Press", 26 *HASTINGS L.J.* 631, 634-35 (1975), but Professor Laurence Tribe considers that position unnecessary because the First Amendment requires government to justify any interference with information gathering, TRIBE, *supra* note 2, at 944 n.5. For discussions regarding whether the First Amendment provides protection to the institutional press beyond that provided by the Free Speech Clause, see C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 *U. MIAMI L. REV.* 819 (1980) (advocating special "defensive" protection under Free Press Clause), and Anthony Lewis, *A Preferred Position for Journalism?*, 7 *HOFSTRA L. REV.* 595 (1979) (opposing special constitutional status for news media).

7. WILLIAM L. RIVERS ET AL., *RESPONSIBILITY IN MASS COMMUNICATION* 48 (3d ed. 1980). The crucial function of the news media in American democracy has been recognized by the United States Supreme Court: "Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

8. *See infra* notes 48-56 and accompanying text.

9. REPORTERS COMM. FOR FREEDOM OF THE PRESS, *CONFIDENTIAL SOURCES & INFORMATION* 2 (1990) [hereinafter *CONFIDENTIAL SOURCES*].

All but a handful of states, by statute<sup>10</sup> or under common law,<sup>11</sup> and an overwhelming majority of federal courts<sup>12</sup> have recognized an eviden-

10. See ALA. CODE § 12-21-142 (1986); ALASKA STAT. §§ 09.25.150-.220 (1983 & Supp. 1990); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (1982 & Supp. 1990); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1966 & Supp. 1991); COLO. REV. STAT. §§ 13-90-119, 24-72.5-101 to 106 (Supp. 1990); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1975); GA. CODE ANN. § 24-9-30 (Michie 1990); ILL. ANN. STAT. ch. 110, paras. 8-901 to 8-909 (Smith-Hurd 1984 & Supp. 1991); IND. CODE ANN. § 34-3-5-1 (Burns 1986); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1972); LA. REV. STAT. ANN. §§ 45:1451-1459 (West 1982 & Supp. 1991); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1989); MICH. STAT. ANN. § 28.945(1) (Callaghan Supp. 1991); MINN. STAT. ANN. §§ 595.023-.025 (West 1988); MONT. CODE ANN. §§ 26-1-901 to -903 (1989); NEB. REV. STAT. §§ 20-144 to -147 (1987); NEV. REV. STAT. ANN. § 49.275 (Michie 1987); N.J. STAT. ANN. §§ 2A:84A-21 to -21.8, 2A:84A-29 (West 1976 & Supp. 1991); N.M. SUP. CT. R. 11-514 (1986); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1991); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Anderson 1981); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1988); 42 PA. CONS. STAT. ANN. § 5942 (1982); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (Supp. 1990).

11. A constitutional or common law qualified privilege for newsgatherers has been recognized by courts in Connecticut, Florida, Idaho, Iowa, Kansas, Maine, Mississippi, New Hampshire, North Carolina, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. See *Connecticut Labor Relations Bd. v. Fagin*, 370 A.2d 1095, 1097-99 (Conn. Super. Ct. 1976); *Miami Herald Publishing Co. v. Morejon*, 561 So. 2d 577, 579-80 (Fla. 1990); *In re Wright*, 700 P.2d 40, 44-45 (Idaho 1985); *Winegard v. Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978); *State v. Sandstrom*, 581 P.2d 812, 814 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); *In re Letellier*, 578 A.2d 722, 726 (Me. 1990); *Mississippi v. Harden*, Crim. No. 3858 (Miss. Cir. Ct. of Yalobusha County Mar. 23, 1983); *Opinion of the Justices*, 373 A.2d 644, 647 (N.H. 1977); *State v. Smith*, 13 Media L. Rep. (BNA) 1940, 1941-42 (N.C. Super. Ct. 1987); *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70, 77 (Tex. Civ. App. 1976); *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va.), *cert. denied*, 419 U.S. 966 (1974); *Senear v. Daily Journal-American*, 641 P.2d 1180, 1183-84 (Wash. 1982); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188, 192-93 (W. Va. 1989); *State ex rel. Green Bay Newspapers Co. v. Circuit Court*, 335 N.W.2d 367, 371-72 (Wis. 1983).

12. A qualified First Amendment privilege for newsgatherers has been recognized by courts in the First, Second, Third, Fourth, Fifth, Eighth, Tenth and the District of Columbia Circuits. See *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.)*, 680 F.2d 5, 7 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982); *Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597-98 (1st Cir. 1980); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

The Sixth Circuit has rejected the privilege. *Storer Communications, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580, 585 (6th Cir. 1987). The Eleventh Circuit has not addressed the privilege, but it is bound by Fifth Circuit precedent. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981). The Seventh Circuit has not addressed the issue, but at least four district courts have recognized the privilege. *United States v. Bingham*, 765 F. Supp. 954, 956 (N.D. Ill. 1991); *May v. Collins*, 122 F.R.D. 535, 540 (S.D. Ind. 1988); *United States v. Lopez*, 14 Media L. Rep. (BNA) 2203, 2205 (N.D. Ill. 1987); *Gulliver's Peri-*

tiary privilege that allows newsgatherers to refuse to testify or disclose their work product. The scope and application of this privilege varies greatly among the states and federal circuits, however.<sup>13</sup>

A multiplicity of rules within jurisdictions further complicates the matter. The federal courts have developed a qualified<sup>14</sup> privilege in which courts engage in a case-by-case balancing of competing interests,<sup>15</sup> weighing a litigant's need for the evidence against the impact disclosure might have on the First Amendment interest in maintaining a "vigorous, aggressive and independent press."<sup>16</sup> In California, the courts have applied both a qualified First Amendment privilege<sup>17</sup> and a state constitutional and statutory immunity from contempt.<sup>18</sup> This state immunity, known as a "shield law," is absolute on its face.<sup>19</sup> Yet it is inapplicable when the journalist is a party to the litigation,<sup>20</sup> and it is qualified when the party seeking disclosure is a criminal defendant.<sup>21</sup>

Journalists contend that they need a testimonial privilege in order to keep their promises of confidentiality to sources who fear retribution or other negative consequences if they are identified.<sup>22</sup> Absent assurance that they never will be identified and put in harm's way, these sources will not provide the information, and the flow of information will be de-

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odicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197, 1202 (N.D. Ill. 1978). Courts in the Ninth Circuit are in conflict. See *infra* note 495.

13. See *infra* notes 117-34 and accompanying text for a discussion of the varying interpretations of the privilege in the federal courts and *infra* notes 191-389 and accompanying text for a discussion of testimonial protections for journalists in California. For a summary of the provisions of the 28 state shield laws and the holdings of state courts interpreting the statutes or recognizing a newsgathering privilege under common law, see CONFIDENTIAL SOURCES, *supra* note 9, at 4-12; James C. Goodale & Joseph P. Moodhe, *Reporter's Privilege Cases*, in 1 COMMUNICATIONS LAW 1990, at 297, 652-716 (Practicing Law Inst. 1990).

14. A privilege protects persons within a protected relationship from compelled disclosure of their communications. BLACK'S LAW DICTIONARY 1078 (5th ed. 1979). A qualified, or conditional, privilege is one in which the party seeking the protected information might overcome the privilege by showing that the interests underlying the privilege are outweighed by the need for disclosure. Duane D. Morse & John W. Zucker, *The Journalist's Privilege*, in TESTIMONIAL PRIVILEGES 407, 409 (Scott N. Stone & Ronald S. Liebman eds., 1983).

15. See *infra* notes 117-34 and accompanying text.

16. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983).

17. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274, 690 P.2d 625, 628, 208 Cal. Rptr. 152, 155 (1984).

18. CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070; see *infra* notes 191-389 and accompanying text.

19. CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070.

20. *Mitchell*, 37 Cal. 3d at 274, 690 P.2d at 628, 208 Cal. Rptr. at 155.

21. *Delaney v. Superior Court*, 50 Cal. 3d 785, 805-06, 789 P.2d 934, 946, 268 Cal. Rptr. 753, 765 (1990).

22. See *infra* notes 48-56 and accompanying text.

creased.<sup>23</sup> Any privilege's value is in its dependability; if it can be abrogated, it provides no real protection.<sup>24</sup> Without a reliable privilege, a source can rely only on the journalist's fortitude in defying a judge who demands disclosure.<sup>25</sup>

Journalists also argue that subpoenas are a serious intrusion into their autonomy.<sup>26</sup> Litigants interfere with newsgathering by drawing off press resources.<sup>27</sup> Furthermore, reporters' independence and reputation for objectivity are threatened both by their use as investigators in an adversarial setting and by public exposure of their work product—including material gathered without a promise of confidentiality.<sup>28</sup>

This Comment reviews the practice among newsgatherers of protecting both the anonymity of their sources and the undisseminated information collected in the course of their duties. It traces (1) the development of a First Amendment-based testimonial privilege in the federal courts, including the Supreme Court's decision in *Branzburg v. Hayes*,<sup>29</sup> and (2) the enactment of California constitutional and statutory provisions immunizing reporters from contempt.

The Comment proceeds to discuss how California courts have applied the First Amendment privilege and state shield law in the contexts of (1) civil actions in which the journalist is a party, (2) civil actions in which the journalist is a nonparty witness, and (3) criminal proceedings. This review culminates in a discussion of *Delaney v. Superior Court*,<sup>30</sup> in which the California Supreme Court adopted a broad interpretation of the shield law's scope and crafted a balancing test for the shield law when invoked by newsgatherers during criminal proceedings.

The Comment concludes by suggesting that the California courts' patchwork approach in applying absolute and qualified testimonial protection for journalists runs afoul of the First Amendment's dual interests in promoting the free flow of information to the public and maintaining an autonomous press, particularly in light of the changing role of the news media in America. The Comment recommends that the journalism

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23. See *infra* notes 52-56 and accompanying text.

24. See Robert Weisberg, Note, Defendant v. Witness: *Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 966 (1978).

25. See *infra* notes 57-76 and accompanying text for a discussion of the journalist's ethical duty to keep promises of confidentiality.

26. See *infra* notes 66-70 and accompanying text.

27. See *infra* notes 68-70 and accompanying text.

28. See *infra* notes 66-67 and accompanying text.

29. 408 U.S. 665 (1972).

30. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

profession develop and enforce strict ethical standards limiting the use of confidential agreements. Further, the legislature should offer California voters a state constitutional amendment that provides: (1) an absolute testimonial privilege barring all types of sanctions for reporters who withhold information under a promise of confidentiality; and (2) a uniformly enforced qualified privilege both for information sought by criminal defendants and defamation plaintiffs, and for undisseminated information not gained under a promise of confidentiality.

## II. STATEMENT OF THE PROBLEM

Traditional First Amendment analysis would forbid compelled disclosure of confidential news sources and information unless there is no alternative less inhibiting to a free press.<sup>31</sup> In *Branzburg v. Hayes*,<sup>32</sup> the United States Supreme Court declined to require such a showing before a grand jury subpoena would be enforced against a journalist<sup>33</sup> because the First Amendment interest in confidentiality could not override the competing interest in pursuing and prosecuting crimes.<sup>34</sup> Other courts, viewing demands for evidence from journalists in different legal contexts, have limited *Branzburg*'s holding to its facts and have demanded such a showing by litigants in both criminal and civil proceedings.<sup>35</sup>

The mixed message of *Branzburg* and its progeny has been carried into California jurisprudence as state courts have struggled to resolve conflicts between press interests under the shield law<sup>36</sup> and the rights of litigants, particularly defamation plaintiffs<sup>37</sup> and criminal defendants.<sup>38</sup> In contrast, in civil actions where the subpoenaed journalist is a nonparty witness, litigants have been found to have no rights deserving of a weigh-

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31. *TRIBE*, *supra* note 2, § 12-22, at 976. Under this reasoning, government action that is largely indifferent to newsgathering, but operates as a deterrent to uninhibited newsgathering, is an "undue hindrance." *Id.* § 12-19, at 944 n.5. Government must demonstrate that there is no alternative that is less inhibiting to the press. *Id.* Typically, courts balance the extent to which communication is inhibited against the values, interests, or rights served by the inhibition. *Id.* § 12-23, at 978-79.

32. 408 U.S. 665 (1972).

33. *See id.* at 702-03.

34. *Id.* at 708; *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting).

35. *See infra* notes 117-34 and accompanying text.

36. CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070 (West Supp. 1991).

37. *See Mitchell v. Superior Court*, 37 Cal. 3d 268, 283-84, 690 P.2d 625, 635, 208 Cal. Rptr. 152, 162 (1984); *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 384, 186 Cal. Rptr. 211, 216 (1982).

38. *See Delaney v. Superior Court*, 50 Cal. 3d 785, 805-06, 789 P.2d 934, 946, 268 Cal. Rptr. 753, 765 (1990); *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 402, 153 Cal. Rptr. 608, 616 (1979).

ing process, and compelled disclosure is forbidden.<sup>39</sup>

Where balancing tests have been applied, they have injected uncertainty into the law. For example, until 1990, a journalist called to the witness stand in a California criminal case could count on the judge to *require* that any party seeking evidence show that the evidence was crucial to the outcome of the case and was unavailable from other sources.<sup>40</sup> In *Delaney v. Superior Court*,<sup>41</sup> however, the California Supreme Court downgraded both of these elements to "factors" a judge *might* consider in a case-by-case balancing test weighing a journalist's claim of privilege against a criminal defendant's right to evidence.<sup>42</sup> Neither element is now required; disclosure may be compelled once a defendant convinces the court there is a reasonable possibility the information would materially assist his or her defense.<sup>43</sup>

The crazy quilt of standards used in various procedural situations has made the privilege increasingly unpredictable for California journalists. Only an omniscient reporter could know prospectively when he or she agrees to keep a secret whether, and in what kind of proceeding, he or she will be subpoenaed. Whether a judge will respect a newsgatherer's claim of privilege tends to hinge on four factors: (1) whether the litigation is governed by state or federal law; (2) whether the litigation is criminal or civil; (3) whether the journalist or his or her employer are parties to the litigation; and (4) what type of information is being sought.

This Comment attempts to assist litigants and newsgatherers in determining where the lines are drawn and what level of protection is likely to be accorded a journalist in each situation. The Comment also demonstrates that the very existence of these categories and inconsistent balancing tests subvert the First Amendment's guarantee of a free press, unhampered in gathering and disseminating information in a democratic society.

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39. See *New York Times v. Superior Court*, 51 Cal. 3d 453, 461-62, 796 P.2d 811, 816, 273 Cal. Rptr. 98, 103 (1990); *Playboy Enters. v. Superior Court*, 154 Cal. App. 3d 14, 28, 201 Cal. Rptr. 207, 218 (1984).

40. See *infra* notes 191-208 and 232-79 and accompanying text for discussions of how California courts applied these standards in libel and criminal proceedings and *infra* notes 117-34 and accompanying text for a discussion of how federal courts applied these standards under qualified First Amendment newsgathering privilege jurisprudence.

41. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

42. *Id.* at 807-09, 789 P.2d at 947-49, 268 Cal. Rptr. at 766-68. For a discussion of these factors, see *infra* notes 330-76 and accompanying text.

43. *Delaney*, 50 Cal. 3d at 808-09, 789 P.2d at 948, 268 Cal. Rptr. at 767.



### III. THE TRADITION OF PROTECTING NEWS SOURCES

Rather than simply serving as a forum for debate,<sup>44</sup> the news media in the United States have adopted a watchdog role in which they seek to independently scrutinize all forces of power in society, including the official power of government.<sup>45</sup> While a majority of Americans does not know that the First Amendment guarantees freedom of the press,<sup>46</sup> pollsters have found enthusiastic support for "watchdogger"—four out of every five people believe press scrutiny keeps leaders from engaging in wrongdoing.<sup>47</sup>

This activist role has placed aggressive reporters and editors into an adversarial relationship with government,<sup>48</sup> the business establishment and interest groups that wield political, social and economic influence.<sup>49</sup> To obtain information about the conduct of these public and private "powers," reporters must rely on employees and others who might be fired, suffer harassment, lose business, or even be injured or killed by those displeased by their disclosures.<sup>50</sup> A vulnerable source typically de-

44. A constitutionally protected "marketplace of ideas" was advocated by Justice Holmes in *Abrams v. United States*: "[T]he ultimate good desired is better reached by free trade in ideas . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

45. AMERICAN SOC'Y OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES, art. I (1975), reprinted in JOHN L. HULTENG, PLAYING IT STRAIGHT 85 (1981).

46. THE TIMES MIRROR CO., THE PEOPLE & THE PRESS 18 (1986). This report contains the results of a survey by The Gallup Organization during the summer and fall of 1985, in what was described as the largest, most fully integrated analysis ever conducted regarding Americans' opinions about the news media. *Id.* at 3.

47. *Id.* at 10-11, 41.

48. Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 234-35 (1971). Perhaps the most dramatic confrontation between government and the press occurred when the Justice Department obtained an injunction restraining *The New York Times* from continuing to publish the "Pentagon Papers," a classified Department of Defense report on the United States' entry into the Vietnam War. The United States Supreme Court dissolved the order with a brief per curiam opinion. *New York Times Co. v. United States*, 403 U.S. 713 (1971). In his concurring opinion, Justice Black found support in the United States Constitution for the activist, watchdog role of the press:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

*Id.* at 717 (Black, J., concurring).

49. See JOHN L. HULTENG, PLAYING IT STRAIGHT 11-12 (1981).

50. See *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972); DAVID SHAW, PRESS WATCH 58-59 (1984); Gene Foreman, *Confidential Sources: Testing Readers' Confidence*, in BELIEVING

mands anonymity or a promise that certain information will not be disclosed unless it is confirmed by other sources.<sup>51</sup>

Although many in the profession believe journalists enter into confidential relationships with news sources far too often,<sup>52</sup> the practice continues unabated.<sup>53</sup> Defenders of the practice contend that if they refuse to promise anonymity to sources, they will be unable to gather informa-

THE NEWS 213, 216-17 (Poynter Institute Ethics Center ed., 1985); Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 12-13 (1986).

51. SHAW, *supra* note 50, at 64-65.

52. See, e.g., SHAW, *supra* note 50, at 52-85; Foreman, *supra* note 50, at 213-14; George Blake, *Rebuilding Credibility*, QUILL, Apr. 1988, at 21, 21-22.

David Shaw, national media critic at the *Los Angeles Times*, concluded that granting news sources anonymity "may be the most widely abused practice in contemporary journalism." SHAW, *supra* note 50, at 59. Unnamed sources are permitted to use the press "to grind axes, advance ambitions, attack rivals and mislead the public." *Id.* at 57. While agreements of confidentiality often are necessary in investigative and foreign reporting, the practice is routine in Washington, D.C. *Id.* at 62-63. Shaw found that while many newspapers have policies restricting the use of unidentified sources, they tend to be unenforced. *Id.* at 74-75.

Gene Foreman, managing editor of the *Philadelphia Inquirer*, argued that use of unnamed sources hurts the general credibility of the news media. Foreman, *supra* note 50, at 213-14. "By the very act of taking someone else into our confidence, we strain the confidence our readers have in us. . . . There is skepticism, even cynicism, among our readers. We invite their wrath when we keep secrets from them, when we tell them: 'Trust us.'" *Id.* at 214.

George Blake, editor of the *Cincinnati Enquirer*, chastised the news media for "rush[ing] rumors, non-stories, and unattributed stories into print and onto the air as quickly as their best reporting." Blake, *supra*, at 21. Calling on the news media to severely limit the use of anonymous sources, Blake has banned articles relying on unnamed sources from the *Enquirer's* front page and will not publish them at all unless they are "very newsworthy." *Id.* at 22-23 (emphasis in original).

53. See Foreman, *supra* note 50, at 214. The prevalence of the practice was amply demonstrated during the war with Iraq, during which the United States military provided reporters with daily briefings in Riyadh, Saudi Arabia. Only a small fraction of reporters were allowed to participate in media pools that accompanied combat troops, leaving hundreds of other reporters to rely on the official briefings for information about the war. The allied commander, General H. Norman Schwarzkopf, regularly provided journalists with a non-televized "background session":

The idea was to reduce the formality and provide an easier atmosphere for give-and-take, maybe taking a little of the edge off the daily military-press encounters.

There is no belief that the information is necessarily any better at these briefings, but some think it gets closer to the bone on the best of days. Information from the backgrounder can be easily spotted in the news because of its attribution to an anonymous "senior military official," a position that rotates among command-level officers.

. . . .  
[There] remains a gnawing doubt about a war in which so much of the hard information passes through public relations specialists at controlled briefings before a captive audience. How much is the military using its prerogative of secrecy for nothing more than old-fashioned public relations?

John Balzar, *Daily Military Briefings: A Mixture of Substance and Smoke*, L.A. TIMES, Feb. 12, 1991, at A5.

tion for stories important to the public,<sup>54</sup> thereby diminishing the news media's watchdog role.<sup>55</sup> As one prominent newspaper editor observed, "We decide that the information is more important than the identity of the provider."<sup>56</sup>

That decision comes with risks. Once a promise of confidentiality is made, a journalist has an ethical obligation to keep the promise,<sup>57</sup> regard-

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54. The Watergate scandal is often cited as justification for the use of confidential sources. See, e.g., Foreman, *supra* note 50, at 215; Monk, *supra* note 50, at 13. *Washington Post* reporters Carl Bernstein and Bob Woodward determined that the White House was involved in the burglary at Democratic headquarters with the help of an anonymous source in the executive branch nicknamed "Deep Throat." They later dedicated their book about the scandal to Nixon Administration members "who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the *Washington Post*." CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 7 (1974).

Woodward told no one, including his editors, the true identity of Deep Throat. *Id.* at 236. Such total nondisclosure fell into disrepute in the profession in 1981 when it was discovered that *Washington Post* reporter Janet Cooke had fabricated a Pulitzer Prize-winning story about an eight-year-old drug addict named "Jimmy." Her editors (including Woodward, who had become metropolitan editor) never required Cooke to tell them the boy's name, despite skepticism among other *Post* staffers about Cooke's report that she had witnessed a drug dealer inject the boy with heroin. STEPHEN KLAIDMAN & TOM L. BEAUCHAMP, *THE VIRTUOUS JOURNALIST* 174-76 (1987). Reporters now are generally required to identify unnamed sources to their editors. Monica Langley & Lee Levine, *Broken Promises*, COLUM. JOURNALISM REV., July-Aug. 1988, at 21, 22.

55. Foreman, *supra* note 50, at 216-17. In his dissent in *Branzburg*, Justice Stewart emphasized the chilling impact that follows from compelled disclosure of sources:

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off the record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.

408 U.S. at 728 (Stewart, J., dissenting) (emphasis in original).

56. Foreman, *supra* note 50, at 216-17.

57. No one code of ethics is binding on journalists in the United States, and many large news organizations have their own policies. The American Society of Newspaper Editors has adopted a Statement of Principles that provides, in pertinent part: "Pledges of confidentiality to news sources must be honored *at all costs*, and therefore should not be given lightly. Unless there is a clear and pressing need to maintain confidences, sources of information should be identified." AMERICAN SOC'Y OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES, *supra* note 45, art. VI (emphasis added).

Similar provisions are found in the SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI CODE OF ETHICS (1973), reprinted in HULTENG, *supra* note 49, at 83; ASSOCIATED PRESS MANAGING EDITORS CODE OF ETHICS (1975), reprinted in HULTENG, *supra* note 49, at 77. For a news organization policy statement, see *Washington Post*, Standards and Ethics (1977), reprinted in RIVERS ET AL., *supra* note 7, at 297.

Some newspapers have begun qualifying their promises to sources. For example, the *Or-*

less of the consequences.<sup>58</sup> Large sums of money sometimes hang in the

*ange County Register* distinguishes between "anonymous sources," whom reporters promise not to identify unless required by the courts, and "confidential sources," who will never be identified. Confidentiality is to be granted only in the "rarest of cases," and only after approval by the newspaper's top editors. Memorandum from N. Christian Anderson, Editor of the *Orange County Register*, to News Division Associates (Sept. 27, 1988) (on file with author). The *Wall Street Journal* has a similar policy, but it allows both reporters and editors to make confidentiality agreements. Langley & Levine, *supra* note 54, at 23.

58. Whether, and how, journalists are legally and ethically bound to keep promises of confidentiality has been the topic of much recent discussion among news professionals. The controversy was sparked primarily by a lawsuit in which a source sued two newspapers who identified him by name after their respective reporters agreed to keep him anonymous. Dan Cohen, public relations director for an advertising agency hired by a candidate for Minnesota governor, provided reporters for the Minneapolis *Star and Tribune* and the St. Paul *Pioneer Press Dispatch* with information about a rival candidate's two arrests for shoplifting and unlawful assembly. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2516 (1991); *Breach of Contract Damages Affirmed*, NEWS MEDIA & THE LAW, Fall 1989, at 35. Although the reporters had promised not to identify Cohen, their editors independently decided to name Cohen in articles about the candidate's arrests because of Cohen's links to an opposition political campaign. *Cohen*, 111 S. Ct. at 2516; Langley & Levine, *supra* note 54, at 22-23. The decision set off a "vigorous debate" in both newsrooms; the reporters objected unsuccessfully and one demanded that her byline be removed from the story. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 201 (Minn. 1990). Cohen was fired the day the articles appeared. *Id.* at 202.

Cohen sued the newspapers for fraudulent misrepresentation and breach of contract, and a jury awarded him \$200,000 in compensatory damages and \$500,000 in punitive damages. *Cohen*, 111 S. Ct. at 2516. The Minnesota Court of Appeals decided Cohen had not proven the fraud claim, and reversed the punitive damage award. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 260 (Minn. Ct. App. 1989). The Minnesota Supreme Court subsequently struck the compensatory damages, finding that an agreement of confidentiality was not an enforceable contract, but rather "an 'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation." *Cohen*, 457 N.W.2d at 203. "The parties understand that a reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. . . . Each party, we think, assumes the risks of what might happen, protected only by the good faith of the other party." *Id.*

The Minnesota Supreme Court went on to discuss whether Cohen should recover damages under promissory estoppel doctrine, which makes an otherwise nonbinding promise enforceable if the promise was reasonably expected to induce action by the promisee, the promise induced such action, and injustice can be avoided only by enforcing the promise. *Id.* at 203-04. The court held that promissory estoppel was inappropriate under the circumstances because the First Amendment interest in public debate, in which the promise of anonymity arose, outweighed the state's common law interest in enforcing the promise through estoppel. *Id.* at 205.

The United States Supreme Court reversed. *Cohen*, 111 S. Ct. at 2516. Since "generally applicable laws do not offend the First Amendment," and because promissory estoppel "does not target or single out the press," the doctrine could be used to enforce an agreement of confidentiality. *Id.* at 2518. The Court remanded the case to the Minnesota Supreme Court to determine whether promissory estoppel was an appropriate claim under state law. *Id.* at 2520.

Disagreement over whether promises to sources are ethically binding arose when Bob Woodward revealed in a book after the death of CIA Director William Casey that Casey was one of his confidential sources. Langley & Levine, *supra* note 54, at 21. Woodward justified the disclosure by stating, "Death is the final release from the agreement." *Id.* at 22. Other circumstances justifying disclosure of confidential sources arise when a source providing infor-

balance; if a news organization is sued for defamation after relying on anonymous sources, it might be ordered by the court to disclose the sources to the plaintiff.<sup>59</sup> If the organization refuses to name the sources, the court could enter a default judgment against the defendant,<sup>60</sup> forbid the organization from using the confidential source in its defense,<sup>61</sup> or instruct the jury to assume that the sources do not exist.<sup>62</sup> Failure to offer evidence that the news organization used reliable sources could justify damages for publishing a false statement of fact with actual malice.<sup>63</sup>

For uncooperative reporters not subject to civil penalties, the courts favor imprisonment. Subpoenaed as a witness by the prosecution or defendant in a criminal case, or by the litigants in a civil suit in which the journalist is not a party, the reporter might be cited for contempt and

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mation about a crime is involved in the crime, and when "a source gives you bad information," according to Woodward. *Id.* *Newsweek* identified Lt. Col. Oliver North as one of the news magazine's sources after North complained to Congress that leaks to the media "very seriously compromised our intelligence activities." *Id.* at 21. The *Washington Post* reported that the Rev. Jesse Jackson had called Jews "Hymies" and New York City "Hymietown," even though the remarks were made at a "not-for-attribution" breakfast meeting with two reporters. Dan Oberdorfer, *Is 'Burning a Source' a Breach of Contract?*, NAT'L L.J., Aug. 1, 1988, at 8. A number of news organizations now view a promise of confidentiality to be an agreement that can only be made by the organization, and the organization—not the reporter—decides whether to keep the agreement. *See id.* at 23-24; Richard P. Cunningham, *Should Reporters Reveal Sources to Editors?*, QUILL, Oct. 1988, at 6, 6-8.

All this provides ammunition to those who contend that journalists do not deserve a testimonial privilege, since some reporters and employers pick and choose when they will be bound by their promises. Media attorney David Bodney observed, "If reporters identify sources—even if compelled by a judge or to bolster their own credibility—the press runs the risk of hurting its argument that it needs confidentiality to preserve newsgathering." Langley & Levine, *supra* note 54, at 24.

59. *See, e.g., Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726-27 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 887 (D. Haw. 1981).

60. *See, e.g., Georgia Communications Corp. v. Horne*, 294 S.E.2d 725, 726 (Ga. Ct. App. 1982).

61. *See, e.g., Laxalt v. McClatchy*, 116 F.R.D. 438, 452-53 (D. Nev. 1987); *Newton v. National Broadcasting Co.*, 198 F.R.D. 522, 532 (D. Nev. 1985); *Dalitz v. Penthouse Int'l, Ltd.*, 168 Cal. App. 3d 468, 475, 214 Cal. Rptr. 254, 258 (1985).

62. *See, e.g., DeRoburt*, 507 F. Supp. at 887; *Downing v. Monitor Publishing Co.*, 415 A.2d 683, 686 (N.H. 1980).

63. In *New York Times Co. v. Sullivan*, the United States Supreme Court held that a public official cannot recover damages for defamation unless the false statement was made with "actual malice"—with knowledge that it was false or with reckless disregard for whether it was false or not. 376 U.S. 254, 279-80 (1964). The actual malice requirement was later extended to public figures and private plaintiffs seeking presumed and punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 349 (1974). When a reporter refuses to identify the source of information in an allegedly defamatory article or broadcast, a plaintiff can legitimately claim that the information was fabricated, showing actual malice. *See Carey*, 492 F.2d at 636; *DeRoburt*, 507 F. Supp. at 886; *Blasi, supra* note 48, at 232; *Foreman, supra* note 50, at 215-16; *Morse & Zucker, supra* note 14, at 464.

sentenced to jail for refusing to disclose evidence deemed relevant by the court.<sup>64</sup> Their practice of taking notes and photographs, their tendency to seek out controversies, and their independence of the disputing parties make journalists attractive and particularly credible witnesses.<sup>65</sup>

The journalist's duty to protect confidential sources is not the only grounds for resisting subpoenas. Reporters and editors object to disclosure of notes, source documents, unbroadcast videotape and unreported recollections because these materials and information are part of a newsgathering process that must remain free from outside interference.<sup>66</sup> They contend that opening their files and testifying for litigants in adversarial proceedings will compromise their reputation for independence and objectivity.<sup>67</sup>

The autonomy argument extends to the practical impact of answering subpoenas. Journalists must stop regular newsgathering efforts so they can retrieve old notes and resource materials and attend court hearings or depositions.<sup>68</sup> This burden is greater for reporters than other citizens because they regularly are sent to accidents, crime scenes and other events likely to generate litigation<sup>69</sup>—making subpoenas frequent and time-consuming.<sup>70</sup>

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64. See *infra* note 72 for a discussion of recent reporter jailings; see also Foreman, *supra* note 50, at 216; Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, Branzburg v. Hayes, and Recent Statutory Developments, 25 ARIZ. L. REV. 815, 816 (1983).

65. CONFIDENTIAL SOURCES, *supra* note 9, at 2; RIVERS ET AL., *supra* note 7, at 200; Morse & Zucker, *supra* note 14, at 408.

66. See Monk, *supra* note 50, at 15; Morse & Zucker, *supra* note 14, at 466.

67. Morse & Zucker, *supra* note 14, at 408.

68. Monk, *supra* note 50, at 52-53; Morse & Zucker, *supra* note 14, at 408. This argument recently persuaded the New York Court of Appeals to recognize a newsgatherer's privilege under the First Amendment and the state constitution that protects unpublished, nonconfidential information. *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277, 279-80 (N.Y. 1988). In his concurring opinion, Justice Bellacosa observed: "The nature of the press function makes it a more likely target for subpoenas which, in turn, will generate cost and diversion in time and attention from journalistic pursuits. . . . Journalists should be spending their time in newsrooms, not in courtrooms as participants in the litigation process." 523 N.E.2d at 283 (Bellacosa, J., concurring); accord *State ex rel. Hudok v. Henry*, 389 S.E.2d 188, 192 (W. Va. 1989).

69. *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *O'Neill*, 523 N.E.2d at 729; Morse & Zucker, *supra* note 14, at 474; see also Opening Brief on the Merits for Real Parties in Interest at 7, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990) (No. S006866).

70. A survey of 1042 newspapers and television stations found that 46.7% had received subpoenas in 1989, for a total of 4408 subpoenas. REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY 5 (1991). The study, by the Reporters Committee for Freedom of the Press, found that 54% of the subpoenas involved criminal cases and 34% of the subpoenas involved civil proceedings. *Id.* at 7. Forty-six percent of the subpoenas sought published or broadcast material; only 5% sought the names of confidential sources or information gained under a promise of confidentiality. *Id.* at 12. Eight percent of the subpoenas were

When forced to choose between the orders of a court seeking everyman's evidence and the ethical standards of their profession,<sup>71</sup> a number of reporters have elected jail.<sup>72</sup> They have argued that the First Amendment protects the process of newsgathering to the point where the courts cannot require them to divulge the names of their sources<sup>73</sup> and the raw

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contested by the media in court; the remainder were complied with, were withdrawn, or the disposition was unknown. *Id.* at 10. Of the challenged subpoenas, 76% were quashed by judges because the information was available elsewhere (26%), the subpoenas were overbroad (17%), the information was privileged under the United States Constitution (13%) or a state shield law (16%), the information was not needed (14%) or irrelevant (13%), or other grounds (1%). *Id.* at 11. Seven survey respondents said they each received more than 100 subpoenas in 1989. *Id.* at 5.

Nineteen respondents said their reporting was affected by the subpoenas, and 17 respondents said they were concerned about the financial strain from legal costs—with one mid-sized Florida newspaper budgeting \$8000 per month for attorney fees. *Id.* at 14. A small newspaper in Massachusetts reported that it was receiving an increasing number of subpoenas for information readily available from other sources. *Id.* An editor there observed: "It makes our job harder because fewer people are willing to volunteer information to our reporters." *Id.*

News organizations in California said they received 594 subpoenas in 1989: 125 for the print media and 469 for the broadcast media. *Id.* at 6. These figures probably are far lower than the actual number of subpoenas, since the survey as a whole had a response rate of 49% and two of California's three largest newspapers, the *Los Angeles Times* and the *Orange County Register*, were not among the respondents. *See id.* at B1.

Of 975 journalists surveyed by Professor Blasi in 1971, 18.5% said they had been served with subpoenas. Blasi, *supra* note 48, at 260.

71. One press commentator has observed: "Any citizen has an obligation to provide testimony if such testimony is necessary to the administration of justice. But the journalist has the additional obligation to defend freedom of the press . . . Reconciling the two obligations is often difficult and sometimes impossible." HULTENG, *supra* note 49, at 18.

72. It is unclear how many reporters have spent time behind bars for withholding evidence, but at least eight have been in custody since 1984. Telephone Interview with Gregg Leslie, Legal Fellow with Reporters Committee for Freedom of the Press (July 17, 1991).

A recent example is the case of Brian Karem, a reporter for KMOL-TV in San Antonio, Texas. A state court held Karem in contempt, sentenced him to six months in jail, and fined him \$500 for refusing to disclose the names of three people who, under promises of confidentiality, helped Karem arrange an interview with a jail inmate accused of murdering a police officer. Goodale & Moodhe, *supra* note 13, at 469-70. A federal district court denied Karem's petition for habeas corpus, holding that no privilege was available under the First Amendment. Karem v. Priest, 744 F. Supp. 136, 141 (W.D. Tex. 1990). The United States Supreme Court refused to issue a stay while Karem appealed to the Fifth Circuit. Karem v. Priest, 110 S. Ct. 3309 (1990).

Karem spent two weeks in Bexar County Jail and was released only after the last of his sources came forward. Goodale & Moodhe, *supra* note 13, at 471.

73. *See, e.g.,* McGraw-Hill, Inc. v. Arizona (*In re Petroleum Prods. Antitrust Litig.*), 680 F.2d 5, 7 (2d Cir.) (trade publication withheld names of confidential sources of oil pricing information), *cert. denied*, 459 U.S. 909 (1982); Riley v. City of Chester, 612 F.2d 708, 710 (3d Cir. 1979) (reporter refused to identify source of information from personnel file); Karem, 744 F. Supp. at 138 (reporter withheld notes containing names, addresses and telephone numbers of confidential sources); Farr v. Superior Court, 22 Cal. App. 3d 60, 66, 99 Cal. Rptr. 342, 345 (1971) (reporter refused to name sources of document disclosed in violation of gag order), *cert. denied*, 409 U.S. 1011 (1972).

material collected or created during their research,<sup>74</sup> even if the information was not gained under a promise of confidentiality.<sup>75</sup>

Although American journalists have obeyed their duties of confidentiality and independence for more than 250 years,<sup>76</sup> these ethical obligations have not gained the same judicial respect accorded lawyers, doctors, psychotherapists and the clergy.<sup>77</sup> Judicial resistance to a uniformly enforced newsgatherer's privilege is especially striking in light of the First Amendment policies that support protection for journalists.

#### IV. ROOTS OF THE PRIVILEGE

##### A. *First Amendment Privilege Jurisprudence*

##### 1. Common law

While the practice of keeping secrets may be a "sacred tenet" of journalism,<sup>78</sup> common law refused to recognize reporters' claims of privilege.<sup>79</sup> Professor Wigmore declared that "[n]o pledge of privacy nor oath of secrecy can avail against demand for truth in a court of justice," including confidential communications to journalists.<sup>80</sup> Courts are reluctant to create new testimonial privileges because they obstruct the search

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74. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139, 142 (3d Cir. 1980) (nonconfidential television outtakes and notes), *cert. denied*, 449 U.S. 1126 (1981); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975) (notes and recollections of interview with identified source); *O'Neill*, 523 N.E.2d at 278 (unpublished photographs of traffic accident).

75. See, e.g., *Dillon v. City of San Francisco*, 748 F. Supp. 722, 724 (N.D. Cal. 1990) (television cameraman refused to testify about observations of alleged beating by police in public); *Hudok*, 389 S.E.2d at 190 (radio reporter refused to testify about interview that had not been broadcast).

76. Benjamin Franklin's half brother was jailed for a month in 1722 for refusing to tell the legislature the name of an author who wrote an article in Franklin's newspaper. Marcus, *supra* note 64, at 817. John Peter Zenger, the first American journalist to argue that truth was a defense to charges of libel, defied the New York colonial governor in 1734 by refusing to name the sources for his articles. MAURICE VAN GERPEN, *PRIVILEGED COMMUNICATION AND THE PRESS* 5-6 (1979).

77. See *supra* notes 78-103 and accompanying text. For a comparison of newsgatherer's privilege and the privileges recognized under common law, see VAN GERPEN, *supra* note 76, at 58-76.

78. "For most journalists . . . protecting source confidentiality has been seen as an ethical and professional imperative. Few tenets of journalism are so sacred as that calling for reporters to abide by promises of confidentiality." DONALD M. GILLMOR ET AL., *MASS COMMUNICATION LAW* 358 (5th ed. 1990).

79. *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972); see VAN GERPEN, *supra* note 76, at 58-85; Marcus, *supra* note 64, at 817-20. One commentator has attributed the courts' reluctance in recognizing a newsgathering privilege comparable to other common law privileges to the professional bias of lawyers. Monk, *supra* note 50, at 46.

80. JOHN HENRY WIGMORE, *EVIDENCE* § 2286 (John T. McNaughton rev., 1961).



for truth<sup>81</sup> and the legislative branch is best suited to evaluate the conflicting interests involved.<sup>82</sup> Critics have doubted journalists' claims that compelled disclosure would significantly hamper newsgathering.<sup>83</sup> They have expressed concern that a privilege would allow reporters to hide fabrication<sup>84</sup> and immunize themselves from libel suits by plaintiffs who must prove actual malice.<sup>85</sup>

The seeds for constitutional conflict between the courts and journalists were sown in 1958 when actress Judy Garland sued CBS over allegedly defamatory remarks about her girth made by an unnamed network executive and published in a *New York Herald Tribune* gossip column.<sup>86</sup> Columnist Marie Torre refused in a deposition to identify the executive; she contended that compelling her to disclose confidential sources would violate the First Amendment's protection of the press.<sup>87</sup> The Second Circuit Court of Appeals<sup>88</sup> agreed that compulsory disclosure of journalists' sources "may entail an abridgment of press freedom by imposing some limitation upon the availability of news."<sup>89</sup> Nevertheless, any news-gathering privilege must yield to the "paramount public interest in the fair administration of justice."<sup>90</sup> Because the identity of the executive was relevant and material to the case, because it was unavailable from other sources, and because it "went to the heart" of Garland's claim, Torre was ordered to answer.<sup>91</sup>

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81. *Trammel v. United States*, 445 U.S. 40, 50 (1980) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))).

82. *University of Pa. v. EEOC*, 110 S. Ct. 577, 582 (1990).

83. See, e.g., *Branzburg*, 408 U.S. at 693 ("[T]he evidence fails to demonstrate that there would be a significant constriction on the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.").

84. HERBERT STRENTZ, *NEWS REPORTERS AND NEWS SOURCES* 100 (1989); Marcus, *supra* note 64, at 819.

85. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 170 (1979); *Carey v. Hume*, 492 F.2d 631, 639-40 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).

86. *Garland v. Torre*, 259 F.2d 545, 547 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); VAN GERPEN, *supra* note 76, at 19; Blasi, *supra* note 48, at 229 n.2.

87. *Garland*, 259 F.2d at 547.

88. The *Garland* opinion was written by then-Circuit Judge Potter Stewart, who would later dissent as a Supreme Court Justice in *Branzburg*. See 408 U.S. at 725 (Stewart, J., dissenting).

89. *Garland*, 259 F.2d at 548.

90. *Id.* at 549.

91. *Id.* at 550-51. Torre served 10 days in jail for contempt of court for refusing to obey the ruling. MARC A. FRANKLIN & DAVID A. ANDERSON, *MASS MEDIA LAW* 579 (1990).

2. *Branzburg v. Hayes*

Battle was fully joined fourteen years later in *Branzburg v. Hayes*.<sup>92</sup> A four-member plurality of the United States Supreme Court<sup>93</sup> rejected the First Amendment privilege claims of three reporters: Paul Branzburg, a newspaper reporter who witnessed drug preparation and use in Kentucky; Paul Pappas, a television reporter who spent time inside Black Panther headquarters during riots in Boston; and Earl Caldwell, a newspaper reporter assigned to cover the Black Panthers and other militant black groups.<sup>94</sup> All three resisted grand jury subpoenas; Kentucky and Massachusetts state courts ruled against Branzburg<sup>95</sup> and Pappas,<sup>96</sup> respectively. The Ninth Circuit Court of Appeals expressly recognized a First Amendment privilege that could be overcome only by a government showing of compelling need, and Caldwell's subpoena was quashed.<sup>97</sup>

In *Branzburg*, the United States Supreme Court reversed the Ninth Circuit and affirmed the Kentucky and Massachusetts state courts, holding that journalists had no First Amendment privilege to refuse to answer "relevant and material questions asked during a good-faith grand jury investigation."<sup>98</sup> The plurality rejected the reporters' argument for a qualified privilege before grand juries,<sup>99</sup> but did not address whether a privilege was available in other judicial proceedings. The Court reasoned that any negative impact on newsgathering by compelled disclosure was speculative,<sup>100</sup> while grand jury investigations fulfill a fundamental government role of protecting citizens and their property.<sup>101</sup> Congress

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92. 408 U.S. 665 (1972).

93. Justice White was joined in the plurality opinion by Chief Justice Burger and Justices Blackmun and Rehnquist. *Id.* at 667. Justice Powell wrote a separate concurring opinion. *Id.* at 709 (Powell, J., concurring).

94. *Id.* at 667-77.

95. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972); *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

96. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

97. *United States v. Caldwell*, 434 F.2d 1081, 1090 (9th Cir. 1970), *rev'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

98. *Branzburg*, 408 U.S. at 708.

99. The reporters did not claim an absolute privilege to refuse to testify under all circumstances. *Id.* at 680. Rather, they argued that a journalist should not be compelled to appear or testify before a grand jury unless it is shown that (1) the reporter has information relevant to a crime under investigation, (2) the information is unavailable from other sources, and (3) the need for the information is "sufficiently compelling" to justify the infringement on First Amendment interests. *Id.*

100. *Id.* at 693-94.

101. *Id.* at 700.

and the state legislatures were free to fashion a statutory privilege for journalists,<sup>102</sup> but the First Amendment offered protection against only those grand jury investigations not conducted in good faith, or undertaken solely to harass the press "to disrupt a reporter's relationship with his news sources."<sup>103</sup>

Four justices dissented.<sup>104</sup> Justice Stewart accused the plurality of taking a "crabbed view of the First Amendment" that demonstrated "a disturbing insensitivity to the critical role of an independent press in our society."<sup>105</sup> The ability to make and keep confidential newsgathering relationships benefited not the private interests of the journalist and source, but the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" <sup>106</sup> Before requiring a journalist to disclose confidential sources, the government should be required to show that (1) the journalist had information clearly relevant to a crime under investigation, (2) there were no alternative sources for the information less destructive of First Amendment rights, and (3) there was a compelling and overriding interest in the information.<sup>107</sup>

It is Justice Powell's "enigmatic"<sup>108</sup> three-paragraph concurring opinion that has proved most influential—and controversial<sup>109</sup>—over the

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102. *Id.* at 706. Congressional efforts to enact a shield law were mounted between 1972 and 1975, but disagreement arose over who should be able to invoke the privilege, what information could be withheld, whether the privilege should preempt state laws, and whether the privilege should be qualified or absolute. VAN GERPEN, *supra* note 76, at 147-66. The campaign died amid a lack of consensus among journalists and members of Congress, accompanied by opposition from the Nixon Administration. *Id.* at 166-70. Some journalists oppose shield laws altogether, arguing that the news media should rely solely on constitutional protections. This position rests on the notion that the First Amendment forbids enactment of *any* law abridging freedom of the press and the fear that a statutory privilege might be interpreted by the courts in a way that inhibits, rather than protects, newsgathering. BRUCE M. SWAIN, REPORTERS' ETHICS 53 (1978).

Shield laws were in effect in 17 states when *Branzburg* was decided. *Branzburg*, 408 U.S. at 689 n.27. Twenty-eight states have shield laws now. See *supra* note 10.

103. *Branzburg*, 408 U.S. at 707-08.

104. Justice Stewart's dissent was joined by Justices Brennan and Marshall. *Id.* at 725 (Stewart, J., dissenting). Justice Douglas wrote a separate dissenting opinion advocating an absolute privilege. *Id.* at 711 (Douglas, J., dissenting).

105. *Id.* at 725 (Stewart, J., dissenting).

106. *Id.* at 737-38 (Stewart, J., dissenting) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

107. *Id.* at 743 (Stewart, J., dissenting).

108. *Id.* at 725 (Stewart, J., dissenting).

109. For discussions regarding the varying interpretations of Justice Powell's concurring opinion in *Branzburg* by the federal courts, see *Storer Communications, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580, 583-86 (6th Cir. 1987); *Karem v. Priest*, 744 F. Supp. 136, 138-42 (W.D. Tex. 1990). Both decisions criticized other courts for relying on Justice

course of time, however.<sup>110</sup> Emphasizing the "limited nature" of the plurality's holding, Justice Powell observed that reporters called before a grand jury were not "without constitutional rights with respect to the gathering of news or in safeguarding their sources."<sup>111</sup> He concluded:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.<sup>112</sup>

Justice Powell's opinion appears to defend the plurality's rejection of any privilege before a grand jury, while simultaneously endorsing a test that balances freedom of the press against the need for evidence in criminal cases.<sup>113</sup> Thus, Justice Powell's concurrence creates a qualified First Amendment privilege in accord with Justice Stewart's dissent.<sup>114</sup> Because Justice Powell's vote was necessary to form a majority, a number of courts and commentators have viewed his opinion as determinative.<sup>115</sup>

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Powell, rather than the *Branzburg* plurality. *Storer Communications*, 810 F.2d at 585; *Karem*, 744 F. Supp. at 142.

110. Many courts have turned to Justice Powell's concurrence, rather than the plurality opinion, in determining whether to force a journalist to testify. See, e.g., *McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.)*, 680 F.2d 5, 8 n.9 (2d Cir.) ("Justice Powell cast the deciding vote in *Branzburg* . . . and therefore his reservations are particularly important in understanding the decision."), *cert. denied*, 459 U.S. 909 (1982); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (Court is "[f]ollowing the lead of Mr. Justice Powell."); *Carey*, 492 F.2d at 636 ("[T]he *Branzburg* result appears to have been controlled by the vote of Justice Powell."). But see *Storer Communications*, 810 F.2d at 585 ("Justice Powell's opinion certainly does not warrant the rewriting of the majority opinion.").

111. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

112. *Id.* at 710 (Powell, J., concurring).

113. See GILLMOR ET AL., *supra* note 78, at 360-61 ("Both [Justice] Stewart and Justice Powell . . . stress the need for a judge to balance the interests of reporters and of justice . . . . It is clear from Powell's concurrence that he would have been more favorably disposed to a privilege claim under a different fact pattern.").

114. *Id.* at 725 (Stewart, J., dissenting); see *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 489, 492 (C.D. Cal. 1981) ("[I]f one aligns Justice Powell's concurring opinion with Justice Stewart's dissent, joined by Justices Brennan and Marshall, and with Justice Douglas's dissent, a majority of five justices accepted the proposition that journalists are entitled to at least a qualified First Amendment privilege.").

115. See, e.g., *United States v. Liddy*, 478 F.2d 586, 586 (D.C. Cir. 1972) ("[T]he *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell."); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 510 (E.D. Va. 1976) ("The minimum

The result has been a qualified First Amendment privilege jurisprudence that, with the acquiescence of the Supreme Court, has grown in size and complexity with each passing year.<sup>116</sup>

### 3. *Branzburg*'s progeny

Just five months after *Branzburg*, the Second Circuit Court of Appeals began to limit the reach of the Supreme Court's plurality opinion. In *Baker v. F & F Investment*,<sup>117</sup> a civil action, the appellate court interpreted *Branzburg* as a rejection of an absolute newsgathering privilege<sup>118</sup> and as an endorsement of a qualified privilege.<sup>119</sup> While crime investigations by grand juries presented a compelling state interest that could overcome First Amendment protections, subpoenas by civil litigants lacked such weight.<sup>120</sup> In the eyes of the *Baker* court, compelled disclosure of confidential sources was to be the exception, not the rule.<sup>121</sup>

In the footsteps of *Baker*, other federal courts have endorsed a *Garland*-based balancing test in civil suits that requires the party seeking the identities of confidential news sources to show that the information sought (1) is highly material and relevant, (2) goes "to the heart" of the party's claim or defense, and (3) is unavailable from alternative

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common denominator of all views expressed [in *Branzburg*] is the opinion of Mr. Justice Powell, that a qualified privilege does exist to protect newsmen's confidential sources."); Marcus, *supra* note 64, at 838 ("[T]he real question is how Justice Powell would respond to a qualified privilege claim.").

116. FRANKLIN & ANDERSON, *supra* note 91, at 600. The Supreme Court has not re-addressed the issue of a newsgathering privilege since *Branzburg*, despite many opportunities to do so. *Id.* One commentator noted a gradual shift of consensus about the true meaning of *Branzburg* from one of rejecting a First Amendment privilege to one in which Justice Powell's opinion is aligned with the dissenters to create a five-vote majority favoring a qualified privilege. Marcus, *supra* note 64, at 836 n.151, 837-38. As a result, First Amendment privilege "has gained such widespread acceptance that its applicability in many situations is no longer open to question." Morse & Zucker, *supra* note 14, at 422.

There now might be a shift back toward a more restrictive view of *Branzburg*, however. See Goodale & Moodhe, *supra* note 13, at 306-08. In *University of Pennsylvania v. EEOC*, the Supreme Court observed that *Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary." 110 S. Ct. 577, 588 (1990). Nevertheless, Justice Powell's opinion has proved to be the hook upon which many state and an overwhelming majority of federal courts have hung a qualified newsgathering privilege. See cases cited in *supra* notes 11-12; GILLMOR ET AL., *supra* note 78, at 360; Goodale & Moodhe, *supra* note 13, at 637-38.

117. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

118. *Id.* at 783.

119. *Id.* at 784.

120. *Id.* at 784-85.

121. *Id.* at 783 (cases are "few in number . . . where First Amendment rights must yield").

sources.<sup>122</sup>

Where the journalist is a defendant in a libel suit and the plaintiff needs the withheld evidence to show actual malice, courts often require disclosure.<sup>123</sup> In contrast, courts have been reluctant to order disclosure in civil suits where the journalist is a nonparty witness.<sup>124</sup> Such decisions have found that the evidence was not critical to the dispute,<sup>125</sup> alternative sources had not been exhausted,<sup>126</sup> or the constitutional interest in an

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122. See, e.g., *McGraw-Hill*, 680 F.2d at 7; *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Carey*, 492 F.2d at 636; *United States v. Bingham*, 765 F. Supp. 954, 958 (N.D. Ill. 1991); *Dillon v. City of San Francisco*, 748 F. Supp. 722, 727 (N.D. Cal. 1990); *May v. Collins*, 122 F.R.D. 535, 540 (S.D. Ind. 1988); *Newton v. National Broadcasting Co.*, 109 F.R.D. 522, 527 (D. Nev. 1985); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1398 (D.D.C. 1973). At least one federal court has rejected the "heart of the claim" element, requiring instead that the testimony sought be relevant and not unduly cumulative. *United States v. Markiewicz*, 732 F. Supp. 316, 320-21 (N.D.N.Y. 1990).

The "highly material and relevant" element occasionally has been combined with the "heart of the claim" element. See, e.g., *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *United States v. Criden*, 633 F.2d 346, 359 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). The two elements may be distinguished, however, if relevancy and materiality refer to the logical relationship between the evidence and the ultimate issue in the underlying case to which it arguably relates, and "heart of the claim" refers to the necessity of the information for the resolution of the entire case. *Goodale & Moodhe, supra* note 13, at 361-62; *Morse & Zucker, supra* note 14, at 428-39.

123. See *Zerilli*, 656 F.2d at 714 ("Proof of actual malice will frequently [require a plaintiff] to demonstrate that the informant was unreliable . . . . Protecting the identity of the source would effectively prevent recovery in many [New York] Times-type libel cases."). Compare *Miller*, 621 F.2d at 726 (disclosure ordered because plaintiff would otherwise have no way of proving defendants misrepresented reports of confidential sources or recklessly relied on those sources) and *Carey*, 492 F.2d at 637 (same) with *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.) (plaintiff failed to exhaust alternative sources), *cert. denied*, 479 U.S. 818 (1986) and *Cervantes v. Time, Inc.*, 464 F.2d 986, 994-95 (8th Cir. 1972) (comprehensive investigation and general accuracy of article made it unlikely that plaintiff could establish actual malice even if sources disclosed), *cert. denied*, 409 U.S. 1125 (1973).

124. See, e.g., *McGraw-Hill*, 680 F.2d at 9 (disclosure not required in lawsuit by states claiming oil companies conspired to fix prices through newsletter); *Zerilli*, 656 F.2d at 714-15 (disclosure not required in civil rights lawsuit against Justice Department for leaks to newspaper); *Riley*, 612 F.2d at 718 (disclosure not required in civil rights lawsuit asserting leaks of personnel records by city officials); *Silkwood*, 563 F.2d at 437 (disclosure not required of documentary filmmaker in lawsuit alleging that employer violated civil rights and contaminated employee with plutonium radiation); *Baker*, 470 F.2d at 785 (disclosure not required in civil rights lawsuit alleging racial discrimination in housing sales); *Democratic Nat'l Comm.*, 356 F. Supp. at 1398 (disclosure not required in lawsuit alleging political espionage and burglary). But see *Dillon*, 748 F. Supp. at 726-27 (journalist required to give eyewitness testimony in civil rights lawsuit alleging excessive force by police); *NLRB v. Mortensen*, 701 F. Supp. 244, 250 (D.D.C. 1988) (reporters required to authenticate quotations by identified sources).

125. See, e.g., *McGraw-Hill*, 680 F.2d at 9; *Riley*, 612 F.2d at 718; *Baker*, 470 F.2d at 783.

126. See, e.g., *McGraw-Hill*, 680 F.2d at 9; *Zerilli*, 656 F.2d at 714; *Baker*, 470 F.2d at 783.

unfettered press outweighed the civil litigant's interest in the evidence.<sup>127</sup> Only the Sixth Circuit has interpreted *Branzburg* as completely rejecting a qualified privilege.<sup>128</sup>

There has been far less agreement regarding the existence or application of a privilege in criminal cases. Some federal courts have held that newsgatherers have no privilege, absolute or qualified, to refuse to testify before grand juries<sup>129</sup> or in any criminal proceeding.<sup>130</sup> Others have recognized a qualified privilege, but found in a case-by-case analysis that the competing constitutional interest in a fair trial outweighed the First Amendment interests underlying the privilege.<sup>131</sup> At least two federal courts have quashed criminal subpoenas seeking information not gained in confidence,<sup>132</sup> but other courts have reasoned that disclosure was

127. See *Zerilli*, 656 F.2d at 712-13. The court observed:

In general, when striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press. Efforts will be taken to minimize impingement upon the reporter's ability to gather news. Thus in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.

*Id.* at 712 (citation omitted).

128. *Storer Communications*, 810 F.2d at 584 & n.6. The court recognized that it was going against the tide of decisions, but it rejected the premise that Justice Powell's concurring opinion in *Branzburg* "warrant[s] the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters." *Id.* at 585.

129. See, e.g., *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975).

130. See, e.g., *Storer Communications*, 810 F.2d at 584; *Karem*, 744 F. Supp. at 139.

131. See, e.g., *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Criden*, 633 F.2d at 357; *United States v. Cuthbertson*, 630 F.2d 139, 147-48 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Farr v. Pitchess*, 522 F.2d 464, 469 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Markiewicz*, 732 F. Supp. at 320-21.

But see *United States v. Burke*, in which the Second Circuit rejected a racketeering defendant's claim that the trial court improperly quashed his subpoena for "virtually every document and tape" in the possession of *Sports Illustrated* dealing with an article about a basketball point-shaving scheme. 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). The defendant contended that the evidence was needed to impeach a key prosecution witness. *Id.* at 78. The appeal court found that the materials were cumulative, and therefore were not necessary or critical to the maintenance of the defense. *Id.*

132. See *United States v. Lopez*, 14 Media L. Rep. (BNA) 2203, 2205 (N.D. Ill. 1987) (information in videotape outtakes available to defendant from other sources); *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982) (reporter not required to verify for prosecution published quotations attributed to defendant).

In *Cuthbertson*, the Third Circuit held that qualified First Amendment privilege was not limited to confidential sources, but extended to reporters' unpublished resource materials, even if no confidential source was involved. 630 F.2d at 147. "Of course, the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case." *Id.* The court went on to find that the trial judge could hold an in camera review of videotaped inter-

appropriate when there was no expectation of<sup>133</sup> or need for<sup>134</sup> confidentiality.

A comprehensive review of qualified First Amendment newsgathering privilege is beyond the scope of this Comment.<sup>135</sup> However, an understanding of the privilege is important because it overlays state laws<sup>136</sup> and has come to fill a major gap resulting from the restrictive procedural language of California's shield law.<sup>137</sup>

## *B. California Statutory and Constitutional Immunity*

### 1. Statutory protection

Despite sweeping language that seemingly allows reporters to withhold in court all information gathered in the course of their duties but

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views for the CBS television news program *60 Minutes* that had not been broadcast, since the defendants could not obtain the tapes elsewhere and they were relevant to the defense case. *Id.* at 148.

133. See *LaRouche Campaign*, 841 F.2d at 1181 (television network must provide for in camera review outtakes sought by defendant of interview with key prosecution witness).

134. See *Criden*, 633 F.2d at 358-59 (reporter must testify about confidential conversations with prosecutor who later acknowledged he was source); *Markiewicz*, 732 F. Supp. at 321 (reporters must testify in criminal prosecution about matters they have already written about).

The lack of a promise of confidentiality has also persuaded courts to reject claims of privilege in civil cases. See, e.g., *Dillon*, 748 F. Supp. at 726-27 (reporter must testify about personal observations because no confidential sources or information sought); *Mortensen*, 701 F. Supp. at 250 (reporters must verify published quotes from identified sources where sources have denied making the statements). But see *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302-03 (M.D. Fla. 1975) (reporter not required to testify about or supply notes regarding published interview with identified source).

135. For discussions of *Branzburg* and First Amendment privilege, see Morse & Zucker, *supra* note 14, at 412-80; Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13 (1988); Marcus, *supra* note 64; James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Glenn A. Brown, Comment, *Just Between You and Me . . . For Now: Reexamining a Qualified Privilege for Reporters to Keep Sources Confidential in Grand Jury Proceedings*, 1988 U. ILL. L. REV. 739 (1988); Sharon K. Malheiro, Note, *The Journalist's Reportorial Privilege—What Does It Protect and What Are Its Limits?*, 38 DRAKE L. REV. 79 (1988); Craig A. Newman, Note, *Qualified Privilege for Journalists*, *Branzburg v. Hayes: A Decade Later*, 61 U. DETROIT J. URBAN L. 463 (1984); Kathryn Jane Humphrey, Note, *Shield Statutes: A Changing Problem in Light of Branzburg*, 25 WAYNE L. REV. 1381 (1979); Susan P. McCarthy, Comment, *The First Amendment Newsman's Privilege: From Branzburg to Farber*, 10 SETON HALL L. REV. 333 (1979).

136. Courts in states lacking a statutory privilege for journalists have tended to adopt the qualified privilege and three-part test developed by the federal courts. GILLMOR ET AL., *supra* note 78, at 360. In states with a statutory shield law, courts have applied First Amendment privilege in situations where the statute does not apply. FRANKLIN & ANDERSON, *supra* note 91, at 601.

137. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 283-84, 690 P.2d 625, 635, 208 Cal. Rptr. 152, 162 (1984) (holding that qualified First Amendment privilege is available when reporter subject to sanctions other than contempt).



which is not publicly disseminated, the California shield law<sup>138</sup> is quite limited in its protection.<sup>139</sup> Although often described as a "privilege,"<sup>140</sup> the law simply prohibits courts from holding reporters in contempt.<sup>141</sup> This immunity does not bar courts from imposing the other sanctions that are available when an uncooperative reporter is a party to the litigation.<sup>142</sup> Nonparty journalists also may be vulnerable to punitive lawsuits and fines that fall outside a court's contempt power.<sup>143</sup>

The limited scope of this immunity, as compared to the broad immunity from all sanctions provided by "true" privileges, has been preserved in the shield law from the time of its enactment in 1935.<sup>144</sup> The first shield law was added to section 1881 of the Code of Civil Procedure,<sup>145</sup> which also contained testimonial privileges for attorneys, clergy, physicians, spouses and public officials.<sup>146</sup> The statute provided that newspaper publishers, editors, or reporters could not be held in contempt for refusing to disclose sources to a court, the legislature, or any administrative body.<sup>147</sup>

The immunity eventually was extended to employees of radio and television stations, press associations and wire services.<sup>148</sup> It was separated from the traditional privileges when the privileges and the shield law were transferred to the California Evidence Code in 1965.<sup>149</sup> In

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138. CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070 (West Supp. 1991).

139. *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 379, 186 Cal. Rptr. 211, 213 (1982).

140. See *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 396-98, 153 Cal. Rptr. 608, 612-13 (1979); *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 426 (1978).

141. *Delaney v. Superior Court*, 50 Cal. 3d 785, 797 n.6, 789 P.2d 934, 939 n.6, 268 Cal. Rptr. 753, 758 n.6 (1990); *KSDO*, 136 Cal. App. 3d at 379-80, 186 Cal. Rptr. at 214. Few states have limited their shield laws in this manner. Montana and New York also have shield laws immunizing journalists only from contempt. See MONT. CODE ANN. §§ 26-1-901 to -903 (1989); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1991). Georgia's new shield law is similar in that it applies only when the journalist is not a party to the action. See GA. CODE ANN. § 24-9-30 (Michie 1990).

142. *Mitchell*, 37 Cal. 3d at 274, 690 P.2d at 628, 208 Cal. Rptr. at 155. For example, if a journalist refuses to identify sources to a plaintiff in a defamation action, a court could enter a default judgment against the defendant or invoke an irrebuttable presumption that no source exists, making it impossible for the defendant to contend that relying on the source was reasonable. Langley & Levine, *supra* note 135, at 25.

143. See *infra* notes 377-89 and accompanying text for a discussion of recent attempts to skirt the shield law's immunity from contempt.

144. Ch. 532, § 1, 1935 Cal. Stat. 1608.

145. CAL. CIV. PROC. CODE § 1881(6) (repealed 1965).

146. *Id.* § 1881(1)-(5) (repealed 1965).

147. *Id.* § 1881(6) (repealed 1965).

148. Ch. 629, § 1, 1961 Cal. Stat. 1797.

149. Ch. 299, § 2, 1965 Cal. Stat. 1297. The lawyer-client, spousal, physician-patient, psychotherapist-patient and clergy-penitent privileges are now codified at §§ 950-1034 of the Evi-

drafting the Evidence Code, the California Law Revision Commission expressed concern about the shield law's ambiguities and broad sweep and concluded that it created an absolute privilege.<sup>150</sup> The Commission recommended enactment of a new, qualified rule allowing compelled disclosure of sources if "required in the public interest or otherwise required to prevent injustice."<sup>151</sup> The Assembly Judiciary Committee rejected this proposal and transferred the shield law into the Evidence Code as section 1070 without change.<sup>152</sup>

The scope of section 1070 was extended in 1971<sup>153</sup> to include former newsmen and, in 1972,<sup>154</sup> to include the proceedings of any body having power to issue subpoenas. In 1974, the California Legislature amended the statute again,<sup>155</sup> adding employees of magazines and other periodicals to the list of those protected.<sup>156</sup>

The 1974 amendment also made the most significant change since the original law was drafted, by expanding the shield law to cover an entirely new class of information.<sup>157</sup> Previously, a newsmen only could refuse to identify sources,<sup>158</sup> but the addition of subsection (c) and

dence Code. CAL. EVID. CODE §§ 950-1034 (West 1966 & Supp. 1991). The newsgatherer's immunity from contempt is codified at § 1070. *Id.* § 1070.

150. 6 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 481, 484-85 (1964). "Despite the absence of reliable evidence in the form of legislative history or judicial interpretation, the effect of the statutory privilege in California appears to be a *carte blanche* grant of an absolute and unqualified privilege to newsmen to refuse to disclose the source of any information procured for and used in the protected news media." 6 *id.* at 484. "There is no apparent exception to the operation of the privilege. . . . There is no safeguard against abuse." 6 *id.* at 485.

151. 7 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 207 (1965).

152. 7 *id.* at 913. The Committee, however, added a comment emphasizing § 1070's limited protection:

Section 1070 continues without change the provisions of subdivision 6 of the Code of Civil Procedure Section 1881. It should be noted that Section 1070, like the existing law, provides an immunity from being adjudged in contempt; it does not create a privilege. Thus, the section will not prevent the use of other sanctions for refusal of a newsmen to make discovery when he is a party to a civil proceeding.

CAL. EVID. CODE § 1070 assembly committee comment (West 1966).

153. Ch. 1717, § 1, 1971 Cal. Stat. 3658. The change was prompted by the jailing of former reporter Bill Farr after the decision in *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972); see *infra* notes 243-50 and accompanying text.

154. Ch. 1431, § 1, 1972 Cal. Stat. 3126.

155. Ch. 1456, § 2, 1974 Cal. Stat. 3184.

156. One court has held that the shield law does not extend to freelance authors unless they have a contractual arrangement with a publisher. *In re Van Ness*, 8 Media L. Rep. (BNA) 2563 (Cal. Super. Ct. L.A. County 1982).

157. Ch. 1456, § 2, 1974 Cal. Stat. 3184; *Hammarley*, 89 Cal. App. 3d at 397, 153 Cal. Rptr. at 612-13.

158. *Hammarley*, 89 Cal. App. 3d at 396, 153 Cal. Rptr. at 612.

a revised subsection (a) allows a journalist to refuse to disclose any "unpublished information" gained while "gathering, receiving or processing . . . information for communication to the public."<sup>159</sup> This expansion of the shield law beyond sources spawned a heated debate in the trial and appellate courts over the law's scope; the dispute remained unresolved until the California Supreme Court's decision in *Delaney v. Superior Court*.<sup>160</sup>

Facially, Evidence Code section 1070 allows any publisher, editor, reporter, or any other employee of a newspaper, magazine, periodical, press association, wire service, or radio or television station subpoenaed by any court or legislative or administrative body to refuse to disclose (1) any source of information procured in their employment, or (2) any information not disseminated to the public that was obtained during newsgathering activities, without the threat of being held in contempt.<sup>161</sup> The immunity, and thus the decision whether to withhold evidence in the face of a subpoena, is held by the journalist, not by the source.<sup>162</sup>

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159. CAL. EVID. CODE § 1070.

160. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

161. Section 1070 provides:

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

CAL. EVID. CODE § 1070.

162. The newsgatherer holds the privilege under qualified First Amendment jurisprudence, and it cannot be waived by other persons. *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). A witness making a claim of immunity under the California shield law must invoke it as he or she would invoke a privilege. *Delaney*, 50 Cal. 3d at 806 n.20, 789 P.2d at 946 n.20, 268 Cal. Rptr. at 765 n.20. The newsgatherer must prove that all the requirements of the shield law have been met. *Id.* The litigant seeking discovery must then convince the court that he or she holds a constitutional right "sufficiently clear and

The shield law's broad sweep, absolute terms and prohibition on the sanction of contempt has caused California courts to grapple with three issues: (1) its application in civil versus criminal proceedings; (2) its availability in actions in which the journalist is a party versus those in which he or she is not; and (3) its protection of confidential versus non-confidential sources and information.<sup>163</sup>

## 2. State constitutional status

In the wake of two decisions holding the shield law inapplicable when courts demand that newsgatherers identify sources who violated court orders,<sup>164</sup> the legislature offered voters Proposition 5,<sup>165</sup> which incorporated section 1070 of the Evidence Code into the California Constitution as article I, section 2(b).<sup>166</sup> With no organized opposition and no ballot arguments urging its rejection, Proposition 5 was approved with seventy-three percent of the vote.<sup>167</sup> While twenty-eight states have shield laws,<sup>168</sup> only California has given the protection constitutional status.<sup>169</sup>

Proponents of Proposition 5 believed that placing section 1070 in the state constitution would deter the courts from carving more exceptions into an immunity that appeared absolute on its face.<sup>170</sup> Article I, section 2(b) displaced Evidence Code section 1070 as the law in Califor-

important to overcome a newsperson's claim of immunity." *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 462 n.11, 796 P.2d 811, 816 n.11, 273 Cal. Rptr. 98, 103 n.11 (1990).

163. See Amy R. Bach, Comment, *Pressing California Shield Law on Criminal Defendants: A Weighting Game*, 11 HASTINGS COMM. & ENT. L.J. 461, 470-71 (1989).

164. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 224, 124 Cal. Rptr. 427, 450 (1975), cert. denied, 427 U.S. 912 (1976); *Farr*, 22 Cal. App. 3d at 72, 99 Cal. Rptr. at 350; see *infra* notes 243-57 and accompanying text.

165. Assembly Constitutional Amendment No. 4, 1978 Cal. Stat. 77.

166. CAL. CONST. art. I, § 2(b). Before Proposition 5, art. I, § 2 provided: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2 (amended 1980). This provision was designated subdivision (a) by Proposition 5, and all three subdivisions of the statutory shield law became art. I, § 2, subdivision (b).

Where § 1070 of the Evidence Code states that a newsperson "cannot be adjudged in contempt," art. I, § 2(b) states that a newsperson "shall not be adjudged in contempt." *Compare* CAL. CONST. art. I, § 2(b) with CAL. EVID. CODE § 1070. In statutes, "cannot" and "shall not" are equivalent. *Gleason v. Spray*, 81 Cal. 217, 220, 22 P. 551, 552 (1889).

167. MARCH FONG EU, SECRETARY OF STATE, SUPPLEMENT TO STATEMENT OF VOTE, PRIMARY ELECTION JUNE 3, 1980, at 6-8.

168. For a list of the 28 states that have enacted shield laws, see *supra* note 10.

169. See CAL. CONST. art. I, § 2(b).

170. In the ballot argument supporting Proposition 5, proponents claimed that the free flow of information was being "threatened by actions of some members of the California Judiciary [who] have created exceptions to the current Newsman's Shield Law. . . . By giving existing law constitutional status, judges will have to give the protection greater weight before attempt-

nia and gave journalists a state constitutional right<sup>171</sup> that could yield only to a federal or another state constitutional right.<sup>172</sup> Nevertheless, ambiguities remained because the language of section 1070 was copied into the state constitution virtually unchanged.<sup>173</sup> Rather than fixing the shield law's problems, the legislature and the voters simply carried them into the constitution and amplified the misunderstanding among the media and the judiciary as to the practical effect of the law.<sup>174</sup>

## V. CALIFORNIA COURTS AND THE NEWSGATHERER'S PRIVILEGE

Long before the California Supreme Court finally tackled the shield law's ambiguities in *Delaney v. Superior Court*,<sup>175</sup> a state appellate court observed that "[t]he judicial history and case interpretation of the news-person's privilege . . . are just as tortuous and confused as its legislative origins."<sup>176</sup> The shield law was unavailable to journalists defending against defamation suits.<sup>177</sup> Where it was available, its language promised absolute protection.<sup>178</sup> Yet courts interpreting the statute found it inapplicable whenever a judge sought information about people violating court orders,<sup>179</sup> when a journalist witnessed criminal activity,<sup>180</sup> and when the news sources were no longer confidential.<sup>181</sup> Courts also found

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ing to compel reporters to breach their pledges of confidentiality." CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 3, 1980, at 19 (Argument in Favor of Proposition 5).

171. *Playboy Enters. v. Superior Court*, 154 Cal. App. 3d 14, 28, 201 Cal. Rptr. 207, 218 (1984). The court reasoned:

It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state.

*Id.*

172. See *New York Times Co.*, 51 Cal. 3d at 462, 796 P.2d at 816, 273 Cal. Rptr. at 103.

173. *KSDO*, 136 Cal. App. 3d at 381-82, 186 Cal. Rptr. at 214-15.

174. See generally Henry C. Kevane, Comment, *The Newsgatherer's Shield—Why Waste Space in the California Constitution?*, 15 SW. U. L. REV. 527 (1985) (arguing that narrow construction of shield law makes provision "nonfunctional surplusage").

175. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

176. *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 382, 186 Cal. Rptr. 211, 215 (1982).

177. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274, 690 P.2d 625, 628, 208 Cal. Rptr. 152, 155 (1984); *KSDO*, 136 Cal. App. 3d at 384, 186 Cal. Rptr. at 216.

178. See CAL. CONST. art. I, § 2(b) (newsperson "shall not be adjudged in contempt"); CAL. EVID. CODE § 1070 (West Supp. 1991) (newsperson "cannot be adjudged in contempt").

179. *Farr v. Superior Court*, 22 Cal. App. 3d 60, 71, 99 Cal. Rptr. 342, 349 (1971), *cert. denied*, 409 U.S. 1011 (1972).

180. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 218-19, 124 Cal. Rptr. 427, 446 (1975), *cert. denied*, 427 U.S. 912 (1976).

181. *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 426 (1978).

that the shield law, both as a statute<sup>182</sup> and as a constitutional provision,<sup>183</sup> could be overcome whenever a criminal defendant demonstrated a need for the information. The constitutional provision also was held to be unavailable when a journalist had information about a public event.<sup>184</sup>

The state supreme court endorsed a broad interpretation of the shield law's scope in *Delaney*, but the decision has created more uncertainty about when the law can be invoked successfully.<sup>185</sup> Consequently, relying on the shield law has become an increasingly risky business for journalists.<sup>186</sup>

Reporters and editors typically find themselves on the witness stand in three circumstances: (1) as a party to a lawsuit; (2) as a nonparty witness in a civil action; or (3) as a nonparty witness in a criminal prosecution.<sup>187</sup> The newsperson's legal standing and the varying competing interests have resulted in the creation of different rules for each situation. Further complicating any review, and confusing some courts, attorneys and journalists,<sup>188</sup> is the fact that California has two tracks of analysis: (1) the protection offered by section 1070 of the Evidence Code and article I, section 2(b) of the California Constitution,<sup>189</sup> and (2) the qualified First Amendment newsgathering privilege developed in the wake of *Branzburg v. Hayes*.<sup>190</sup>

#### A. *The Newsgatherer as a Party in Civil Actions*

Although the shield law prohibits contempt as a sanction for journalists who refuse to testify, it does not preclude the imposition of other sanctions that become available when a journalist is a party to the ac-

182. *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 402, 153 Cal. Rptr. 608, 616 (1979).

183. *Hallissy v. Superior Court*, 200 Cal. App. 3d 1038, 1046, 248 Cal. Rptr. 635, 639 (1988).

184. *Liggett v. Superior Court*, 224 Cal. App. 3d 426, 443-44, 260 Cal. Rptr. 161, 171 (1989), *vacated*, 800 P.2d 516, 275 Cal. Rptr. 160 (Cal. 1990); *Delaney v. Superior Court*, 215 Cal. App. 3d 681, 691, 249 Cal. Rptr. 60, 66 (1988), *aff'd on other grounds*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990). *But see* *New York Times Co. v. Superior Court*, 215 Cal. App. 3d 672, 679, 248 Cal. Rptr. 426, 429-30 (1988) (holding that shield law is absolute when journalist is called as nonparty witness in civil action), *aff'd*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990).

185. See *infra* notes 330-76 for a discussion of the *Delaney* balancing test.

186. See *infra* notes 450-74 and accompanying text.

187. See CONFIDENTIAL SOURCES, *supra* note 9, at 2.

188. *KSDO*, 136 Cal. App. 3d at 379-80, 186 Cal. Rptr. at 213.

189. See *infra* notes 301-26 and accompanying text.

190. 408 U.S. 665 (1972). See *supra* notes 92-134 and accompanying text for a discussion of *Branzburg* and qualified First Amendment newsgathering privilege.

tion,<sup>191</sup> most often as a defendant in a defamation suit. In these circumstances, a journalist may rely only on the qualified protections of the First Amendment.<sup>192</sup>

That this federal constitutional privilege remains available to journalists unable to invoke the California shield law was first recognized in *KSDO v. Superior Court*.<sup>193</sup> An appellate court rejected the media defendants' contention that the shield law should be interpreted broadly to forbid *any* type of sanction,<sup>194</sup> and emphasized the narrow legal circumstances in which the shield law could be invoked:

The description "shield law" conjures up visions of broad protection and sweeping privilege. The California shield law, however, is unique in that it affords only limited protection. It does not create a privilege for newsmen [that would prohibit all types of sanctions], rather it provides an immunity from being adjudged in contempt. This rather basic distinction has been misstated and apparently misunderstood by members of the news media and our courts as well.<sup>195</sup>

Even so, the *KSDO* court did not leave defamation defendants without protection when they refuse to testify or comply with discovery. It embarked on a balancing analysis under the First Amendment to the United States Constitution, relying on Justice Powell's concurring opinion in *Branzburg v. Hayes*.<sup>196</sup> Newsgatherers would be able to safeguard confidential information when necessary to ensure the free flow of information to the public, even when the shield law was unavailable.<sup>197</sup>

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191. *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 384, 186 Cal. Rptr. 211, 216 (1982). Available sanctions in a libel suit include striking an uncooperative reporter's defenses or awarding the plaintiff a default judgment. *Id.* See *supra* notes 60-62 for cases imposing civil sanctions when journalists refused to identify sources.

192. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 283-84, 690 P.2d 625, 635, 208 Cal. Rptr. 152, 162 (1984).

193. 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982). In *KSDO*, a radio reporter broadcast a news report stating that Riverside police were under investigation for allegedly using police cars to transport heroin into the city from Tijuana. *Id.* at 378, 186 Cal. Rptr. at 212. Police officers sued for defamation and sought production of the reporter's notes and other documents relating to the reporter's conversations with the story's sources, whom the reporter identified in a deposition. *Id.* at 379, 186 Cal. Rptr. at 213. The trial court ordered disclosure, holding that the shield law was inapplicable when the invoking newsmen was a party to the action. *Id.*

194. *Id.* at 383-84, 186 Cal. Rptr. at 216.

195. *Id.* at 379-80, 186 Cal. Rptr. at 213.

The *KSDO* court also found the constitutionalization of the shield law irrelevant, because art. I, § 2(b) did not alter the contempt language of § 1070 of the Evidence Code. *Id.* at 383, 186 Cal. Rptr. at 215.

196. 408 U.S. 665, 709-10 (1972) (Powell, J., concurring).

197. *KSDO*, 136 Cal. App. 3d at 385, 186 Cal. Rptr. at 217. "[A]fter careful examination,

In *Mitchell v. Superior Court*,<sup>198</sup> the California Supreme Court adopted *KSDO*'s narrow interpretation of the shield law's procedural application and recognized the independent protection provided by the United States Constitution. A unanimous court held that a qualified First Amendment privilege<sup>199</sup> was available to newsgatherers in circumstances falling outside the scope of the shield law.<sup>200</sup> Justice Broussard, writing for the court, identified five factors courts must weigh in deciding whether to compel disclosure of confidential sources or unpublished information supplied by those sources.<sup>201</sup>

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*Branzburg* and other cases interpreting *Branzburg* stand for a qualified newsmen's privilege to safeguard confidential sources and materials where the privilege furthers the First Amendment interest of the free flow of information." *Id.*

The availability of a First Amendment privilege, the *KSDO* court decided, depended on (1) whether the proceeding was criminal or civil, (2) whether the newsmen was a party to the action, (3) whether there were alternative sources for the information, and (4) whether the information sought went to the "heart of the claim." *Id.* at 386-87, 186 Cal. Rptr. at 217. The requirement that newsgatherers disclose confidential information to litigants if there are no alternative sources and the evidence goes to the "heart of the claim" was first announced in *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *see supra* notes 86-91 and accompanying text.

Although the reporter in *KSDO* was a party to the action, and the truth or falsity of the news report was an essential issue in the case, the court found that the plaintiffs failed to show that the information sought was unavailable from other sources or actually went to the heart of the claim. *KSDO*, 136 Cal. App. 3d at 386, 186 Cal. Rptr. at 217-18. A writ of mandate was granted reversing the trial court's discovery order. *Id.*, 186 Cal. Rptr. at 218.

198. 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984).

In *Mitchell*, the Synanon Church and its leader, Charles Dederich, obtained a discovery order in their libel suit against *Reader's Digest* and David and Cathy Mitchell, owners of the tiny *Point Reyes Light* newspaper. *Id.* at 272, 690 P.2d at 627-28, 208 Cal. Rptr. at 154-55. *Reader's Digest* had published an article recounting how the Mitchells had won the Pulitzer Prize for their reporting on Synanon, in which it stated that Synanon raised money with false claims that it was rehabilitating drug addicts. *Id.* at 272, 690 P.2d at 627, 208 Cal. Rptr. at 154. *Reader's Digest* revealed its sources for its article, and among them were the Mitchells. *Id.* at 273, 690 P.2d at 627, 208 Cal. Rptr. at 154. The trial court then ordered the Mitchells to provide every document they had referring or relating to Dederich and Synanon. *Id.*

199. *Id.* at 274, 690 P.2d at 628, 208 Cal. Rptr. at 155. The court noted that a common law newsgatherer's privilege independent of the United States Constitution was recognized in *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), and *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1982). *Mitchell*, 37 Cal. 3d at 274 n.3, 690 P.2d at 628 n.3, 208 Cal. Rptr. at 155 n.3. Such reasoning is impermissible in California, however, because the Evidence Code bars common law privileges. *Id.* Under California law, "[e]xcept as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness. (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing." CAL. EVID. CODE § 911 (West 1966). However, § 911 cannot bar recognition of privileges founded on the constitution. *Mitchell*, 37 Cal. 3d at 274 n.3, 690 P.2d at 628 n.3, 208 Cal. Rptr. at 155 n.3.

200. *Mitchell*, 37 Cal. 3d at 283-84, 690 P.2d at 635, 208 Cal. Rptr. at 162.

201. *Id.* at 279, 690 P.2d at 632, 208 Cal. Rptr. at 159. It is useful to note that the *Mitchell* court applied First Amendment privilege to promises of confidentiality, departing from the positions of some federal courts applying the privilege to non-confidential information. *See*,



First, is the reporter a party to a civil action? In a defamation suit, disclosure is usually appropriate, but "by no means . . . automatic."<sup>202</sup> Second, how relevant is the information to the cause of action? "Mere relevance is insufficient to compel discovery; disclosure should be denied unless the information goes 'to the heart of the plaintiff's claim.'"<sup>203</sup> Third, has the plaintiff exhausted all alternative sources of obtaining the information? Compelled disclosure of sources is the "last resort" and should be used only if the plaintiff shows there is no other practical way to obtain the information.<sup>204</sup> Fourth, how important is it to protect the pledge of confidentiality? Compelled disclosure may be denied when the information "relates to matters of great public importance" and when there is a substantial risk of harm to the source.<sup>205</sup> Fifth, in a defamation action, has the plaintiff made a prima facie showing that the alleged defamatory statements are false? Only if falsity is established as a jury question should disclosure be compelled.<sup>206</sup>

By recognizing a First Amendment privilege, the *Mitchell* decision filled a gap created by the shield law's limited immunity from contempt.<sup>207</sup> The California Supreme Court saw this qualified privilege as one with teeth: disclosure would not be compelled unless the evidence was crucial to the action and unavailable elsewhere.<sup>208</sup>

### B. *The Newsgatherer as a Nonparty Witness in Civil Actions*

As a state constitutional provision, the shield law has proven most useful to newsgatherers subpoenaed in civil suits in which they are not

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e.g., *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

202. *Mitchell*, 37 Cal. 3d at 279, 690 P.2d at 632, 208 Cal. Rptr. at 159.

203. *Id.* at 280, 690 P.2d at 632, 208 Cal. Rptr. at 159 (quoting *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958)).

204. *Id.* at 282, 690 P.2d at 634, 208 Cal. Rptr. at 161.

205. *Id.* at 282-83, 690 P.2d at 634, 208 Cal. Rptr. at 161.

206. *Id.* at 283, 690 P.2d at 634, 208 Cal. Rptr. at 161. The *Mitchell* court concluded that the discovery order must be reversed because Dederich and Synanon had failed to show that they had exhausted alternative sources, that the broad discovery requested was necessary to the claim, and that the statements were false. *Id.* at 283-84, 690 P.2d at 635, 208 Cal. Rptr. at 162.

207. *Id.* The court observed:

In conclusion, the superior court in this case ordered extensive disclosure of sources and information on the ground that there was no reporter's privilege in California. We have concluded that the basis for this ruling was erroneous; that the California courts should recognize a qualified reporter's privilege, depending upon a balancing of the relevant considerations in each case.

*Id.*

208. *Id.* at 280-82, 690 P.2d at 632-34, 208 Cal. Rptr. at 159-61.

parties. With one exception,<sup>209</sup> California courts have held consistently that the right of civil litigants to relevant evidence does not rise to the level of the state constitutional right allowing newsgatherers to withhold identities of sources and unpublished information.<sup>210</sup>

The shield law's sweeping, absolute protection of unpublished information sought from nonparty journalist witnesses in civil proceedings was recognized in *Playboy Enterprises v. Superior Court*.<sup>211</sup> There, an appellate court concluded that civil litigants have no rights sufficient to overcome the absolute immunity from contempt granted by article I, section 2(b) of the California Constitution.<sup>212</sup> It rejected a qualified privilege-style balancing test for evidence falling under the shield law, holding that application of the *KSDO v. Superior Court*<sup>213</sup> criteria "would eviscerate the newsperson's protection."<sup>214</sup>

Nonconfidential resource materials held by *Playboy* magazine were clearly protected under the shield law, the court reasoned, because the trial court could compel disclosure only with its contempt power.<sup>215</sup> By placing section 1070 in the state constitution, the voters manifested the intent to give newspersons "the highest possible level of protection from compelled disclosure."<sup>216</sup> The state interest in promoting full discovery in civil litigation must yield to the clear mandate of paramount state law, the California Constitution.<sup>217</sup>

209. See *Liggett v. Superior Court*, 224 Cal. App. 3d 426, 443-44, 260 Cal. Rptr. 161, 171 (1989) (holding that newsgatherers cannot withhold observations of public events), *vacated*, 800 P.2d 516, 275 Cal. Rptr. 160 (Cal. 1990). The *Liggett* holding was rejected by the California Supreme Court in *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 462, 796 P.2d 811, 816, 273 Cal. Rptr. 98, 103 (1990).

210. *New York Times Co.*, 51 Cal. 3d at 462, 796 P.2d at 816, 273 Cal. Rptr. at 103; *Playboy Enters. v. Superior Court*, 154 Cal. App. 3d 14, 28, 201 Cal. Rptr. 207, 218 (1984).

211. 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984).

In *Playboy Enterprises*, the defendants in a breach of contract and fiduciary duty suit obtained a trial court order requiring *Playboy Enterprises* to produce in discovery all records and editorial materials relating to a *Playboy* magazine interview of the plaintiffs, comedians Richard "Cheech" Marin and Thomas Chong. *Id.* at 17-18, 201 Cal. Rptr. at 211. The defendants, the duo's former business agents, contended that Chong's remarks in the interview revealed that Marin and Chong voluntarily entered into an agreement with the agents knowing it would not be lucrative. Kevane, *supra* note 174, at 530-32. When Chong denied in deposition that he had made the statements, the defendants subpoenaed the *Playboy* interviewer's notes, tapes and records. *Playboy Enters.*, 154 Cal. App. 3d at 17-18, 201 Cal. Rptr. at 211.

212. *Playboy Enters.*, 154 Cal. App. 3d at 28, 201 Cal. Rptr. at 218.

213. 135 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982); see *supra* notes 193-97 and accompanying text.

214. *Playboy Enters.*, 154 Cal. App. 3d at 27, 201 Cal. Rptr. at 217.

215. *Id.*

216. *Id.* at 27, 201 Cal. Rptr. at 217-18.

217. *Id.* at 28, 201 Cal. Rptr. at 218.

The absolute protection recognized in *Playboy Enterprises*<sup>218</sup> was rejected in *Liggett v. Superior Court*,<sup>219</sup> causing a split among the appellate courts.<sup>220</sup> The *Liggett* court confused the shield law's absolute immunity from contempt with the qualified First Amendment privilege recognized by the California Supreme Court in *Mitchell v. Superior Court*,<sup>221</sup> and excepted from shield law protection journalists' observations of public events.<sup>222</sup> Even though the shield law prohibited the trial court in *Liggett* from holding a television cameraman in contempt for refusing to testify, the appellate court held that a newsgatherer's right to withhold evidence was contingent on passing the *Mitchell* balancing test.<sup>223</sup> The confusion in *Liggett* was aggravated further by the court's adoption of a "public event" exception that was based on a review of the shield law's

218. *Id.*

219. 224 Cal. App. 3d 426, 260 Cal. Rptr. 161 (1989), *vacated*, 800 P.2d 516, 275 Cal. Rptr. 160 (Cal. 1990).

220. The conflict among the appellate courts was discussed by the California Supreme Court in *Delaney v. Superior Court*, 50 Cal. 3d 785, 803-04, 789 P.2d 934, 944-45, 268 Cal. Rptr. 753, 763-64 (1990).

221. *Liggett*, 224 Cal. App. 3d at 441-43, 260 Cal. Rptr. at 170; *see Mitchell v. Superior Court*, 37 Cal. 3d 268, 283-84, 690 P.2d 625, 635, 208 Cal. Rptr. 152, 162 (1984).

222. *Liggett*, 224 Cal. App. 3d at 443-44, 260 Cal. Rptr. at 171.

The *Liggett* dispute arose when a load of packaged meat spilled from a truck onto a freeway in Bakersfield. *Id.* at 429, 260 Cal. Rptr. at 161-62. As a KERO-TV cameraman was filming an interview with a highway patrolman, John Liggett's automobile struck accident debris, skidded out of control and flipped over, seriously injuring Liggett. *Id.* at 429, 260 Cal. Rptr. at 162. Liggett sued the owner of the meat truck and the State. *Id.* KERO-TV supplied Liggett with a copy of the film it broadcast after the accident, but filed a motion to quash when Liggett subpoenaed the cameraman to testify at a deposition. *Id.* The trial court granted the motion. *Id.* at 430-31, 260 Cal. Rptr. at 162.

223. *Id.* at 443, 260 Cal. Rptr. at 170. After a review of *Branzburg v. Hayes*, 408 U.S. 665 (1972), and its progeny, the *Liggett* court adopted what it represented as Professor Tribe's conclusion that there is no First Amendment privilege to protect confidential sources and then, ironically, based its ruling on *Mitchell*'s interpretation of *Branzburg* case law. *Liggett*, 224 Cal. App. 3d at 433, 260 Cal. Rptr. at 171.

Justice Baxter, author of the *Liggett* decision, misread Professor Tribe, however. Although Professor Tribe expressed concerns about the United States Supreme Court's refusal to recognize a First Amendment privilege in *Branzburg* and *Herbert v. Lando*, 441 U.S. 153 (1979) (holding that newsgatherers' thoughts and conversations with colleagues were not privileged in libel actions by public figures), he observed that "lower federal courts have consistently read [*Branzburg*] to support some kind of qualified privilege for reporters." *TRIBE, supra* note 2, § 12-22, at 976. Professor Tribe's position is *contra* that represented by Justice Baxter. Tribe states:

[Q]ualified privileges . . . are arguably required by the first amendment's implicit guarantee against undue interference with the acquisition of knowledge. . . . Given the problems that required disclosure of confidences creates for effective information gathering, traditional first amendment theory should prohibit government compulsion of such disclosure—from reporters or other researchers—absent a demonstration that the legal system lacks a less inhibiting alternative.

*Id.*

legislative history and ballot arguments for Proposition 5.<sup>224</sup> The court held that the cameraman must testify because "happenstance" observations of events that occur in public, in contrast to information from confidential sources, do not fall within the protection of what the court lumped together as the "shield law and privilege."<sup>225</sup>

This division over the applicability of the shield law in nonparty civil litigation situations was resolved by the California Supreme Court in *New York Times Co. v. Superior Court*.<sup>226</sup> In two paragraphs, a unanimous court<sup>227</sup> dispensed with the *Liggett* confusion: by its terms, the

224. *Liggett*, 224 Cal. App. 3d at 443-44, 260 Cal. Rptr. at 171. The court reasoned: Compelling a newsperson to disclose the identity of a confidential source or unpublished information from such a source would seriously undermine and interfere with the news gathering function. This underlying reason for creating the shield law and privilege simply does not exist in the instant case where the information sought was observed by happenstance in public, is not from a confidential source, and is not even the work product of the cameraman.

*Id.* at 442-43, 260 Cal. Rptr. at 171.

225. *Id.* at 442-43, 260 Cal. Rptr. at 171. The court did not attempt to define "public event" or "happenstance." Arguably, a one-on-one interview in a restaurant is a public event, despite promises of confidentiality. It also is unclear why the court concluded that the TV cameraman's presence at the scene was happenstance, since he was sent there by the television station while on duty and he was observing and filming events to provide a news report for the station's viewers. *See id.* at 429, 260 Cal. Rptr. at 162.

226. 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990).

Volkswagen of America, Inc., defending itself against a products liability lawsuit, had issued a subpoena for photographs of an automobile accident taken by a photographer for the *Santa Barbara News-Press*. *New York Times Co. v. Superior Court*, 215 Cal. App. 3d 672, 674, 248 Cal. Rptr. 426, 426-27 (1988), *aff'd*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990). When the *News-Press*, which is owned by the *New York Times Co.*, refused to let Volkswagen compare the *News-Press*'s unpublished accident photographs with those Volkswagen obtained from the California Highway Patrol, the trial court ruled that only a qualified privilege applied and it would review the photographs in camera to determine if the privilege was outweighed by Volkswagen's right to discovery of relevant information. *Id.* at 675, 248 Cal. Rptr. at 427. The court of appeal reversed, adopting the *Playboy Enterprises* position that nonparty newsgatherers held an *unqualified* protection against subpoenas from civil litigants. *Id.* at 678-79, 248 Cal. Rptr. at 430. The court observed:

Whether the photographs sought are bound for oblivion in a wastebasket or have some special significance to the *News-Press* is not important. The newsgatherer on the beat does not have to worry about potential uses of his or her material in third party actions. The [state] Constitution and the statute recognize that a newsgatherer's information must be protected whether or not that information comes from a confidential source.

*Id.* at 679, 248 Cal. Rptr. at 429-30.

227. Justice Mosk dissented only with respect to the majority's holding that the *Santa Barbara News-Press*'s petition for extraordinary relief was premature because the newspaper had not yet been cited for contempt. *New York Times Co.*, 51 Cal. 3d at 464, 796 P.2d at 818, 273 Cal. Rptr. at 105 (Mosk, J., dissenting). The majority held that precontempt appellate review was inappropriate because the trial court had not yet ascertained whether the sought-after information came within the scope of the shield law and whether contempt was the proper sanction for nondisclosure. *Id.* at 459-60, 796 P.2d at 814-15, 273 Cal. Rptr. at 101-02. No relief was available until a judgment of contempt is entered. *Id.* at 460, 796 P.2d at 815, 273

shield law does not provide for a balancing test, so such an approach is necessary only when the immunity conflicts with federal or other state constitutional rights.<sup>228</sup> A litigant's "showing of need" for the sought-after material is insufficient; the party seeking disclosure must assert a competing state or federal constitutional right.<sup>229</sup> The newspaper therefore had an absolute immunity from contempt<sup>230</sup> for withholding traffic accident photographs sought by the defendant in a civil suit.<sup>231</sup>

### C. *The Newsgatherer as a Witness in Criminal Proceedings*

#### 1. The road to *Delaney v. Superior Court*

When confronted with the competing, constitutionally protected rights of criminal defendants,<sup>232</sup> California courts have forced the shield law to yield in either its scope or its application. Before the California Supreme Court's decision in *Delaney v. Superior Court*,<sup>233</sup> courts tended to carve exceptions into the law's scope, finding that the immunity was unavailable to journalists questioned about (1) court investigations,<sup>234</sup> (2)

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Cal. Rptr. at 102. The court went on to decide the other issues, however, because "no purpose would be served by remanding the case to the trial court merely for the purpose of entering a contempt judgment." *Id.* at 461, 796 P.2d at 815, 273 Cal. Rptr. at 102.

Justice Mosk argued that appellate review was appropriate "once it is clear that contempt is imminent. The reporter should not be required to await writ review until he has suffered the humiliation of being held in contempt by a judge and a bailiff has placed him in handcuffs and led him off to jail." *Id.* at 470, 796 P.2d at 821-22, 273 Cal. Rptr. at 108-09 (Mosk, J., dissenting).

228. *Id.* at 461-62, 796 P.2d at 816, 273 Cal. Rptr. at 103.

229. *See id.* at 462, 796 P.2d at 816, 273 Cal. Rptr. at 103. Volkswagen had not asserted a competing constitutional right. *Id.* The court limited the holding to the facts of the case, however—noting that "in a future case" a civil litigant seeking discovery from a nonparty newsgatherer might present a state or federal constitutional right that must be weighed against the immunity provided by the shield law. *Id.* at 462 n.11, 796 P.2d at 816 n.11, 273 Cal. Rptr. at 103 n.11. "A trial court in such a case, however, should carefully consider whether the asserted constitutional right is sufficiently clear and important to overcome a newsperson's claim of immunity, which is grounded in a specific constitutional provision—article I, section 2(b)." *Id.*

230. Because the shield law provides only an immunity from contempt, the court accepted the contention of Volkswagen that the *Santa Barbara News-Press* could be subject to sanctions under § 1992 of the Code of Civil Procedure, which provides for a civil action to recover damages from a witness who disobeys a subpoena. *Id.* at 464, 796 P.2d at 818, 273 Cal. Rptr. at 105; *see* CAL. CIV. PROC. CODE § 1992 (West 1983). *See infra* notes 380-85 and accompanying text for a discussion of the court's holding.

231. *New York Times Co.*, 51 Cal. 3d at 464, 796 P.2d at 818, 273 Cal. Rptr. at 105.

232. "No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

233. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

234. *See Rosato v. Superior Court*, 51 Cal. App. 3d 190, 224, 124 Cal. Rptr. 427, 450 (1975), *cert. denied*, 427 U.S. 912 (1976); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 71, 99 Cal. Rptr. 342, 349 (1971), *cert. denied*, 409 U.S. 1011 (1972).

eyewitness observations of crimes,<sup>235</sup> and (3) information not held in confidence.<sup>236</sup> Other courts adopted a broad interpretation of the shield law's scope, accepting the plain language of the provision, but limited the law's *application* by employing balancing tests<sup>237</sup> akin to qualified First Amendment privilege.<sup>238</sup>

The state supreme court finally tackled the dispute in *Delaney*, twenty years after California judges began jailing uncooperative reporters who fell within the shield law's facial protection.<sup>239</sup> The *Delaney* court adopted a broad reading of the law's scope,<sup>240</sup> but crafted a new balancing test providing journalists with less protection than that afforded by many federal courts<sup>241</sup> and earlier state appellate rulings.<sup>242</sup>

*a. what information is protected?*

Before *Delaney*, the courts carved the first exception into the shield law for themselves: journalists could not invoke the statutory immunity from contempt in defiance of a judge seeking information for the court's own purposes. The rule, spawned in *Farr v. Superior Court*,<sup>243</sup> was thrown into doubt when the shield law was copied into the state constitution<sup>244</sup> and appears to have been rejected by the state supreme court in *Delaney*.<sup>245</sup>

In *Farr*, a newspaper reporter refused to answer a judge's questions

235. See *Rosato*, 51 Cal. App. 3d at 218-19, 124 Cal. Rptr. at 446.

236. *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 426 (1978).

237. See *Hallissy v. Superior Court*, 200 Cal. App. 3d 1038, 1045-46, 248 Cal. Rptr. 635, 639 (1988); *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 402, 153 Cal. Rptr. 608, 616 (1979).

238. See *supra* notes 117-34 and accompanying text for a discussion of qualified First Amendment newsgathering privilege.

239. See *infra* note 250 for a discussion of the jailing of reporter Bill Farr and *infra* note 253 for a discussion of the jailing of the "Bee Four." A sixth jailing occurred when Will Lewis, manager of Los Angeles radio station KPFK, refused to provide a federal grand jury with originals of a letter and a tape recording sent to him by radical groups claiming to have information about the kidnapping of heiress Patty Hearst. *GILLMOR ET AL.*, *supra* note 78, at 359. Lewis spent 16 days in federal prison for contempt. *Id.* He disclosed the material after the contempt conviction was affirmed by the Ninth Circuit Court of Appeals. *Id.*; see *In re Lewis*, 377 F. Supp. 297 (C.D. Cal. 1974), *aff'd*, 501 F.2d 418 (9th Cir.), *cert. denied*, 420 U.S. 913 (1975). Lewis raised a privilege claim under the First Amendment, and apparently did not seek protection under the California shield law. See *Lewis v. United States*, 501 F.2d at 421.

240. See *infra* notes 301-26 and accompanying text.

241. See *supra* notes 117-34 and accompanying text.

242. See *infra* notes 269-79 and accompanying text.

243. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972).

244. CAL. CONST. art. I, § 2(b). See *supra* notes 164-74 and accompanying text for a discussion of the shield law's incorporation into the California Constitution.

245. See *infra* note 324 for a discussion of the California Supreme Court's analysis of the shield law's status as a constitutional provision.

about how he obtained a written statement by a witness in the multiple-murder trial of Charles Manson and his followers.<sup>246</sup> Because the sources were subject to a court-imposed gag order,<sup>247</sup> the outcome did not turn on the conflict between the newsgatherer's immunity and a criminal defendant's right to evidence. Rather, a court of appeal cited the trial court's duty to take reasonable measures to protect defendants from the harmful effects of pretrial publicity.<sup>248</sup> A gag order binding court officers was an appropriate measure, and to enforce it a judge must have the power to investigate violations of the order.<sup>249</sup> The court held that section 1070 of the Evidence Code was invalid under such circumstances because the legislature could not interfere with a court's "inherent and vital power . . . to control its own proceedings and officers."<sup>250</sup>

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246. *Farr*, 22 Cal. App. 3d at 64, 99 Cal. Rptr. at 344. *Los Angeles Herald Examiner* reporter Bill Farr obtained three copies of the statement, which was made by a prosecution witness who had not yet testified. *Id.* According to the statement, Manson follower Susan Atkins had confessed to the killings, implicated Manson, and reported that the defendants had planned to murder a series of celebrities, including Frank Sinatra and Elizabeth Taylor. *Id.*

247. The statement had been distributed by the prosecution to the defendants' attorneys. *Id.* Farr later acknowledged that he had obtained copies of the statement from three people subject to a court order prohibiting attorneys, court employees, attaches and witnesses from releasing for public dissemination any information about testimony and evidence that might be given in trial. *Id.* at 64-65, 99 Cal. Rptr. at 344. Farr invoked § 1070 of the Evidence Code when the trial judge asked him to identify his sources, and the *Los Angeles Herald Examiner* published a story based on the witness statement the next day. *Id.* at 65, 99 Cal. Rptr. at 344.

Eighteen months later, after the Manson defendants were convicted and sentenced to death, and after Farr had left the newspaper to become press secretary to the Los Angeles County District Attorney, the trial judge held a hearing to determine who had released the witness statement. *Id.* at 65, 99 Cal. Rptr. at 345. Farr again invoked § 1070, but the judge held him in contempt and ordered him jailed for refusing to answer questions about the identity of his sources or the circumstances under which he obtained the statement. *Id.* at 66, 99 Cal. Rptr. at 345.

248. *Id.* at 72, 99 Cal. Rptr. at 350; see *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (holding that courts must take steps to prevent outside interferences from frustrating judicial functions).

249. *Farr*, 22 Cal. App. 3d at 70, 99 Cal. Rptr. at 348.

250. *Id.* at 69, 99 Cal. Rptr. at 348. The trial court's contempt judgment was affirmed; Farr was ordered to answer the questions. *Id.* at 73, 99 Cal. Rptr. at 348.

Farr's petition for hearing by the state supreme court was denied. The United States Supreme Court denied certiorari. 409 U.S. 1011 (1972). Subsequent *habeas corpus* proceedings also were unsuccessful. See *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re Farr*, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974). Farr was jailed for 48 days and was freed only after a judge determined that the reporter would never name his source, no matter how long he was incarcerated. VAN GERPEN, *supra* note 76, at 23; see *In re Farr*, 36 Cal. App. 3d at 584, 111 Cal. Rptr. at 653 (holding that commitment for contempt must be limited to five days once court determines that indeterminate civil commitment has become punitive, rather than coercive, in nature).

The appeal court in *Farr v. Superior Court* said it was unnecessary to decide whether § 1070 of the Evidence Code was available to ex-journalists like Farr. *Farr*, 22 Cal. App. 3d at 69, 99 Cal. Rptr. at 347-48. Nevertheless, the case sparked an amendment to § 1070 extending

The rule was reiterated in *Rosato v. Superior Court*.<sup>251</sup> again, a court was seeking information for its own purposes, rather than enforcing a subpoena from a criminal defendant. In *Rosato*, two reporters and two editors at the *Fresno Bee* were held in contempt for refusing to answer questions about the source of a sealed grand jury transcript.<sup>252</sup> An appellate court held that the journalists were required to answer the vast majority of questions<sup>253</sup> put to them at a special hearing to determine who had violated the gag order and supplied them with the transcript.<sup>254</sup> The shield law had to yield to the court's right to conduct an investigation aimed at ensuring a fair trial and disciplining those who violated the court's orders.<sup>255</sup>

In dicta, the *Rosato* court recognized a second exception to section 1070: newsgatherers could not refuse to testify about criminal activity they observed or in which they participated.<sup>256</sup> In all other respects, the court said, the shield law was "absolute."<sup>257</sup>

The judicial departure from the plain language of section 1070 became even more blatant in *CBS, Inc. v. Superior Court*.<sup>258</sup> In that case, a

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its protection to former newsgatherers. Ch. 1717, § 1, 1971 Cal. Stat. 3658 (codified as amended at CAL. EVID. CODE § 1070 (West Supp. 1991)); see Kevane, *supra* note 174, at 544 n.105.

251. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976).

252. *Id.* at 198-99, 124 Cal. Rptr. at 432-33. The grand jury had indicted a Fresno city councilman, a former city planning commissioner and a local land developer on charges of bribery and conspiracy. *Id.* at 199, 124 Cal. Rptr. at 433. In addition to sealing the transcript until after trial, the court issued an exhaustive gag order barring the attorneys, parties in the case, and court and law enforcement employees from making statements outside court or releasing documents or evidence. *Id.* at 200, 124 Cal. Rptr. at 433. Nevertheless, the *Fresno Bee* ran stories on three consecutive days quoting extensively from the grand jury transcript. *Id.* at 201, 124 Cal. Rptr. at 434.

253. The court said the questions must be limited to those directed toward determining whether court officers supplied the transcript. *Id.* at 223-25, 124 Cal. Rptr. at 449-50. Questions about possible other sources were impermissible. *Id.* at 224, 124 Cal. Rptr. at 450. Certiorari was denied by the United States Supreme Court. 427 U.S. 912 (1976).

The reporters and editors, nicknamed the "*Bee Four*," continued to refuse to answer the questions and were held in contempt. VAN GERPEN, *supra* note 76, at 26. They were jailed for 15 days, until the trial court judge decided that further incarceration would not cause them to reveal the source of the transcript. *Id.*; Goodale & Moodhe, *supra* note 13, at 494.

254. *Rosato*, 51 Cal. App. 3d at 231, 124 Cal. Rptr. at 454.

255. *Id.* at 224, 124 Cal. Rptr. at 449.

256. *Id.* at 218, 124 Cal. Rptr. at 446. The court based this conclusion on *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972) ("It would be frivolous to assert . . . that the First Amendment . . . confers a license on either the reporter or his news sources to violate valid criminal laws."), and on analogous limitations on legislative, executive, attorney-client, marital communications, physician-patient and psychotherapist-patient privileges. *Rosato*, 51 Cal. App. 3d at 219, 124 Cal. Rptr. at 446.

257. *Rosato*, 51 Cal. App. 3d at 224, 124 Cal. Rptr. at 450.

258. 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978).



court refused to recognize that the shield law created two separate categories of information subject to nondisclosure: (1) sources, and (2) unpublished information.<sup>259</sup> Instead, it injected a requirement of promised confidentiality into the statute, engendering even more confusion over the shield law's scope.<sup>260</sup>

The court of appeal focused on an agreement in which CBS promised not to broadcast videotape revealing the identities of sheriff's narcotics investigators until their undercover mission had ended.<sup>261</sup> By taking the witness stand, the court reasoned, the investigators "revealed their identities and roles. Thus, the underlying purpose of the agreed confidentiality was lost."<sup>262</sup> Absent a continuing confidential relationship with a source, newsgatherers had no right to withhold unpublished information.<sup>263</sup> In other words, only confidential sources and information were protected under the shield law.

This reasoning was repudiated early the following year by another appellate court, in *Hammarley v. Superior Court*.<sup>264</sup> A newspaper reporter, relying solely on section 1070 of the Evidence Code and not raising a First Amendment claim,<sup>265</sup> refused to testify or disclose resource materials about a published interview.<sup>266</sup> In contrast to *CBS, Inc.*, the *Hammarley* court relied on the plain language of the statute and rejected

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259. *Id.* at 250, 149 Cal. Rptr. at 426.

260. *Id.* In *CBS, Inc.*, two men charged with selling the illegal drug PCP subpoenaed videotapes made by the television network during meetings between the defendants and undercover Santa Clara County Sheriff's Department investigators. *Id.* at 246, 149 Cal. Rptr. at 423. Portions of the videotapes were used for the news program *60 Minutes*. *Id.* Although the defendants claimed the tapes were necessary to refresh the recollections of three detectives involved in the investigation, CBS attorneys made a motion to quash the subpoena, which was denied. *Id.* at 246-48, 149 Cal. Rptr. at 423-25.

261. *Id.* at 250, 149 Cal. Rptr. at 426.

262. *Id.*

263. *Id.* The court stated:

Petitioner argues that, since the outtakes are unpublished, section 1070 expressly applies. The fact of their being unpublished, however, strikes us as not in itself significant where, as here, the claimant of the privilege fails to explain what of substance in the materials sought to be produced has not already been revealed.

*Id.*

264. 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979).

265. *Id.* at 395, 153 Cal. Rptr. at 611.

266. *Id.* at 392-94, 153 Cal. Rptr. at 609-10. When *Sacramento Union* reporter John Hammarley invoked § 1070 in response to a subpoena for testimony and materials dealing with his interviews with a former member of the Mexican Mafia prison gang, the trial court ruled that the shield law was inapplicable because the source was not confidential. *Id.* at 394, 153 Cal. Rptr. at 611. Hammarley's articles in the *Union* and in *New West* magazine contained statements by the gang member implicating three men in a murder; in the ensuing criminal case, the defendants sought information about the interviews in the hope of impeaching Hammarley's source, who had become a prosecution witness. *Id.* at 392-93, 153 Cal. Rptr. at 610-11. When Hammarley refused to produce his tapes, notes and transcriptions for an in camera

the trial court's requirement that the withheld evidence be confidential.<sup>267</sup> Rather, "unpublished information is not limited to material which might lead to the disclosure of a newsman's confidential sources, but encompasses *all* information acquired . . . in the course of his professional activities which he has not disseminated to the public."<sup>268</sup>

*b. when must the protection yield?*

The *CBS, Inc.* and *Hammarley* decisions also were significant in the development of a balancing test for courts faced with the conflicting demands of a criminal defendant and a journalist withholding information that falls within the shield law's scope. In discussing the network's qualified First Amendment privilege claim,<sup>269</sup> the *CBS, Inc.* court applied a balance previously developed for criminal defendants who sought to overcome prosecutorial privilege: a defendant is entitled to discovery if he or she demonstrates a *reasonable possibility* the evidence sought might result in the defendant's exoneration.<sup>270</sup> In *CBS, Inc.*, disclosure posed a "tenuous restraint" for the network's newsgathering abilities, while non-disclosure would have directly impaired the ability of the defendants to get a fair trial.<sup>271</sup>

Nevertheless, because the *CBS, Inc.* court removed the television outtakes from section 1070's scope, it was in *Hammarley* that a California appellate court was first forced to address a direct conflict between the shield law and a criminal defendant's fair trial right.<sup>272</sup> The notion that section 1070 of the Evidence Code created a true privilege<sup>273</sup> helped

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review, the judge cited him for contempt and ordered him jailed. *Id.* at 394, 153 Cal. Rptr. at 611.

267. *Id.* at 397-98, 153 Cal. Rptr. at 613.

268. *Id.* (emphasis added).

269. *CBS, Inc.*, 85 Cal. App. 3d at 251-52, 149 Cal. Rptr. at 426. See *supra* notes 117-34 and accompanying text for a discussion of qualified First Amendment privilege.

270. *CBS, Inc.*, 85 Cal. App. 3d at 251-52, 149 Cal. Rptr. at 426; see *People v. Borunda*, 11 Cal. 3d 523, 527, 522 P.2d 1, 3, 113 Cal. Rptr. 825, 827 (1974) (police must disclose identity of confidential informant only when criminal "defendant demonstrates a reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in defendant's exoneration").

271. *CBS, Inc.*, 85 Cal. App. 3d at 252, 149 Cal. Rptr. at 427. The trial court was ordered to review the videotapes in camera to determine whether they contained evidence bearing on the defendants' guilt or innocence, and whether disclosure of edited materials would fulfill the defendants' needs while protecting the interests of the network and law enforcement. *Id.* at 253-54, 149 Cal. Rptr. at 428. Inexplicably, the court observed that in camera editing might preserve "CBS's claimed pledge of secrecy," even though it previously stated that the confidentiality was abrogated and no longer a factor in the analysis. *Id.* at 250, 149 Cal. Rptr. at 426.

272. *Hammarley*, 89 Cal. App. 3d at 397-98, 153 Cal. Rptr. at 613.

273. The *Hammarley* court referred to the shield law throughout the opinion as a "statutory privilege" and cited "federal and state constitutional imperatives" as justification for a

create a rule repeatedly cited<sup>274</sup>—that criminal defendants seeking information falling within the scope of section 1070 must show that (1) the evidence sought is relevant and necessary, (2) there is a reasonable possibility the evidence might result in the defendant's exoneration, and (3) the evidence is unavailable from alternative sources.<sup>275</sup>

The *Hammarley* court's expansive interpretation of section 1070's scope<sup>276</sup> and its strict three-prong test for abrogating the immunity became the last word regarding the California shield law in the criminal setting for eleven years, until *Delaney*.<sup>277</sup> The *Hammarley* test ensured that the shield would give way<sup>278</sup> only when a criminal defendant demonstrated that he or she needed the evidence to gain a fair trial and that any prospective burden on newsgathering was "highly speculative and uncertain."<sup>279</sup>

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balancing test similar to that used by the *CBS, Inc.* court in analyzing First Amendment privilege. See *id.* at 399, 153 Cal. Rptr. at 614.

274. See *Hallissy*, 200 Cal. App. 3d at 1045, 248 Cal. Rptr. at 639; *Playboy Enters. v. Superior Court*, 154 Cal. App. 3d 14, 24-25, 201 Cal. Rptr. 207, 215 (1984).

275. *Hammarley*, 89 Cal. App. 3d at 399, 153 Cal. Rptr. at 614. Like the *CBS, Inc.* court, the court in *Hammarley* turned to *Borunda* to find the exoneration requirement. *Id.*; see *supra* note 270.

276. See *supra* notes 263-68 and accompanying text.

277. *Delaney*, 50 Cal. 3d at 805-07, 789 P.2d at 945-47, 268 Cal. Rptr. at 764-76.

278. Because the defendants in *Hammarley* had met the test, disclosure was required. *Hammarley*, 89 Cal. App. 3d at 402, 153 Cal. Rptr. at 616.

The opposite result was reached under the same three-prong test in *Hallissy v. Superior Court*. Erin Hallissy, a reporter for the *Contra Costa Times*, interviewed a man charged with three murders and facing the possibility of the death penalty. *Hallissy*, 200 Cal. App. 3d at 1041, 248 Cal. Rptr. at 635-36. After the *Contra Costa Times* published a story in which the defendant said he had killed for pay, Hallissy's notes were sought by the defense. *Id.*, 248 Cal. Rptr. at 636. Defense lawyers argued that the materials were necessary to prove their client had made inconsistent statements to a number of people, and his statements to Hallissy were not credible. *Id.*

The court held that the defendant had "approache[d] an adequate showing of relevancy," but he had made no showing the sought-after material was necessary to his case. *Id.* at 1046, 248 Cal. Rptr. at 639. By conceding that he made confessions to other people, the defendant failed to meet the requirements that there be no alternative sources and there was a reasonable possibility the material might result in exoneration. *Id.*

279. *Hammarley*, 89 Cal. App. 3d at 402, 153 Cal. Rptr. at 616. While confidentiality was not required to bring material within the ambit of § 1070, the court considered it relevant in weighing the competing interests:

At stake here is defendants' right meaningfully to confront and cross-examine their primary accuser with the benefit of all evidence reasonably available to challenge his credibility. Petitioner's interest is in the vindication of a privilege not to disclose unpublished information which here was freely volunteered with no pledge of confidentiality asked or given and which only fortuitously falls within the literal scope of section 1070 not because of a perceived need for confidentiality but because of the vagaries of editorial judgment.

*Id.* at 401, 153 Cal. Rptr. at 615-16.

## 2. *Delaney v. Superior Court*'s new balance

In contrast to its predecessor cases, where conflicts arose over the refusal of journalists to testify about capital murder cases,<sup>280</sup> government misconduct<sup>281</sup> or Pulitzer Prize-winning investigations,<sup>282</sup> *Delaney v. Superior Court*<sup>283</sup> was spawned by a routine newspaper story and a routine arrest.<sup>284</sup> No promises of confidentiality were made or even discussed.<sup>285</sup> Rather, *Delaney* involved the kind of gatekeeping<sup>286</sup> decisions made every day by reporters and editors that make articles readable in style and length, and which are normally made without concern about the possible demands of litigants. Here, editorially insignificant—but legally crucial—information was left out of print.

It was the very routineness of the circumstances that tested the parameters of the shield law and forced the California Supreme Court to define the scope and application of article I, section 2(b) of the California Constitution.

### a. background

For an article about the formation of a Long Beach police task force to combat downtown drug sales, thefts and panhandling, *Los Angeles Times* reporter Roxana Kopetman and photographer Roberto Santiago Bertero accompanied task force officers on patrol on September 23, 1987.<sup>287</sup> At a shopping mall, officers spotted Sean Patrick Delaney and a companion sitting on a bench.<sup>288</sup> When the officers asked Delaney about a plastic bag protruding from his shirt pocket, Delaney pulled out the

280. See *Hallissy*, 200 Cal. App. 3d at 1041, 248 Cal. Rptr. at 635-36.

281. See *Rosato*, 51 Cal. App. 3d at 199, 124 Cal. Rptr. at 433.

282. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 272, 690 P.2d 625, 627, 208 Cal. Rptr. 152, 154 (1984).

283. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

284. *Id.* at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.

285. See *id.*

286. "Gatekeeping" refers to the process by which reporters and editors make decisions about what to cover, write or tape stories about, and publish or broadcast. This process of selection, which determines what information becomes available to the public, has been studied extensively to determine how standardized it is among a variety of news media decision-makers, and what factors influence their choices. Significant studies applying gatekeeping theory include: G.A. Donohue et al., *Structure and Constraints on Community Newspaper Gatekeepers*, 66 JOURNALISM Q. 807 (1989); David Manning White, *The Gate-Keeper: A Case Study in the Selection of News*, 27 JOURNALISM Q. 383 (1949); D. Charles Whitney & Lee B. Becker, *'Keeping the Gates' for Gatekeepers: The Effects of Wire News*, 59 JOURNALISM Q. 60 (1982).

287. *Delaney v. Superior Court*, 215 Cal. App. 3d 681, 685, 249 Cal. Rptr. 60, 61 (1988), *aff'd*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

288. *Id.*

bag to reveal that it contained a piece of gold and an item of jewelry, which Delaney said he intended to pawn at the mall.<sup>289</sup>

The officers' suspicions were aroused because there were no pawn shops in the mall; they asked for Delaney's identification, and Delaney reached for his jacket on the bench.<sup>290</sup> The officers later testified that they asked to check the jacket before Delaney picked it up, and that Delaney consented.<sup>291</sup> One of the officers found a set of brass knuckles inside the jacket.<sup>292</sup>

Four days later, the *Los Angeles Times* published an article about the downtown task force that mentioned the police contact with Delaney.<sup>293</sup> It included a photograph of Delaney and his companion on the mall bench, but it did not state whether Delaney consented to the search.<sup>294</sup>

Delaney, meanwhile, was charged with possession of brass knuckles, a misdemeanor.<sup>295</sup> Contending that he had not consented to the jacket search, Delaney moved to suppress evidence of the brass knuckles and subpoenaed Kopetman and Bertero to testify at the suppression hearing in municipal court.<sup>296</sup> After the court denied the journalists' motions to quash the subpoenas, Kopetman and Bertero were called to the stand by the prosecutor. They confirmed information included in the article—that they had, in fact, witnessed the search.<sup>297</sup> But they cited article I, section 2(b) of the California Constitution, section 1070 of the Evidence Code and the First Amendment to the United States Constitution, and refused to answer questions about unpublished information, including whether Delaney had consented to the search.<sup>298</sup> Kopetman and Bertero

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289. *Delaney*, 50 Cal. 3d at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Delaney*, 215 Cal. App. 3d at 685, 249 Cal. Rptr. at 62.

294. *Id.*

295. *Id.*; see CAL. PENAL CODE § 12020(a) (West Supp. 1991).

296. *Delaney*, 50 Cal. 3d at 793-94, 789 P.2d at 937, 268 Cal. Rptr. at 765.

297. Opening Brief on the Merits for Real Parties in Interest at 3, *Delaney v. Superior Court*, 50 Cal. 3d 785, 268 Cal. Rptr. 753, 789 P.2d 934 (1990) (No. S006866).

298. *Id.* Kopetman believed that her independence as a reporter would be compromised if she testified. Roxana Kopetman, *Notebooks—Not Toothbrushes*, STATEWIDE BENCH/BAR/MEDIA NEWSLETTER (State Bar of California), June 1988, at 1. She later explained her reasoning:

While I can sympathize with the prosecutor and the public defender, the greater good in this case unquestionably is served by opposing such pressure. To testify would send a message to sources and others that reporters can and will become witnesses in criminal or civil actions—a message that would irreparably harm the public's perception of the press as an objective provider of information. Such a message could also dry up our sources and discourage our aggressive reporting if now, all of a

were cited for contempt.<sup>299</sup> They immediately petitioned for writs of habeas corpus.<sup>300</sup>

*b. scope of the shield law*

In *Delaney*, the California Supreme Court endorsed a broad interpretation of the types of information that can be withheld by journalists in the face of a subpoena and the threat of contempt.<sup>301</sup> In doing so, the state high court rejected the reasoning of *CBS, Inc. and Liggett v. Superior Court*,<sup>302</sup> where appellate courts had determined that "unpublished information" could be withheld under the shield law only if it were main-

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sudden, the inevitable consequence of our reporting is to be forced to testify in court cases.

*Id.* at 1, 3.

299. Chris Woodyard, *Times Reporter Held in Jail for 6 Hours*, L.A. TIMES, Dec. 10, 1987, at 38. The judge ordered Kopetman immediately jailed during the hearing December 9, 1987, and fined her \$100 per day, up to a maximum \$1000, until such time as she agreed to answer the prosecutor's questions. *Id.* Kopetman remained in custody until late that evening, after counsel for the *Los Angeles Times* filed a petition for writ of habeas corpus in superior court. *Id.* The writ was issued pending a full hearing. Brief of Real Parties in Interest at 3-4, *Delaney* (No. S006866). On December 10, 1987, Bertero was held in contempt after he, too, refused to answer questions, but he was not jailed in light of the superior court's action regarding Kopetman's writ. *Id.* at 4. A writ of habeas corpus subsequently was filed in superior court on Bertero's behalf. *Id.*

300. Kopetman and Bertero petitioned the superior court, which granted writs of habeas corpus quashing the contempt citations. *Delaney*, 50 Cal. 3d at 794, 789 P.2d at 937-38, 268 Cal. Rptr. at 756-57. *Delaney* and the Long Beach City Prosecutor filed a joint petition for writ of mandate in the court of appeal, which was granted, and the contempt citations were reinstated. *Id.* at 794, 789 P.2d at 938, 268 Cal. Rptr. at 757.

Although the court of appeal was affirmed by the California Supreme Court, the lower court's decision is worthy of separate discussion because it used a very different analysis than the supreme court. The appellate court chose to avoid a conflict of rights that would require a balancing test by limiting the shield law's scope to those situations in which "trust [has been] placed in the newsperson." *Delaney*, 215 Cal. App. 3d at 691, 249 Cal. Rptr. at 62. The appellate court reasoned that the shield law's purpose was to protect journalists who, to gather news, must promise either to not identify the source of information or to publish only some of the information provided by the source. *Id.* at 689, 249 Cal. Rptr. at 65-66. The court found support for this conclusion in a state senate committee analysis prepared during consideration of the 1974 amendment extending § 1070 of the Evidence Code to include unpublished information and a ballot argument in support of Proposition 5. *Id.*; see *infra* notes 311 & 316. Both emphasized the need to keep journalists who honor pledges of confidentiality out of jail. *Delaney*, 215 Cal. App. 3d at 689-90, 249 Cal. Rptr. at 64-65.

Requiring confidentiality removes from shield law protection eyewitness observations at a public event. Therefore, the court of appeal reasoned, a journalist must testify about the event as would any other citizen. *Id.* at 691, 249 Cal. Rptr. at 66.

301. *Delaney*, 50 Cal. 3d at 805, 789 P.2d at 945, 268 Cal. Rptr. at 764.

302. 224 Cal. App. 3d 426, 260 Cal. Rptr. 161 (1989), *vacated*, 800 P.2d 516, 275 Cal. Rptr. 160 (Cal. 1990).

tained under a promise of confidentiality.<sup>303</sup>

Writing for a unanimous California Supreme Court,<sup>304</sup> Justice Eagleson observed that article I, section 2(b) of the California Constitution<sup>305</sup> protects journalists from being held in contempt for refusing to disclose either of two separate and independent types of information: (1) unpublished information, or (2) the source of information, whether published or unpublished.<sup>306</sup> The language of the shield law was "clear and unambiguous"<sup>307</sup>—"any unpublished information" was the equivalent of *all* information.<sup>308</sup> Furthermore, article I, section 2(b) provided an explicit, broad definition of unpublished information unqualified by any requirement of confidentiality.<sup>309</sup> Thus, unpublished information was not restricted to information obtained by a journalist under a promise of confidence.<sup>310</sup>

The legislative history of section 1070, relied on by courts that demanded a threshold showing of confidentiality,<sup>311</sup> was "beside the point" because the unambiguous language of article I, section 2(b) and section 1070 made judicial construction unnecessary.<sup>312</sup> Moreover, Justice Eagleson wrote, it was the *voters'* intent in passing Proposition 5, and not that of the legislature, that counted,<sup>313</sup> and legislative materials had not

303. See *id.* at 443, 260 Cal. Rptr. at 171-72; *CBS, Inc.*, 85 Cal. App. 3d at 250, 149 Cal. Rptr. at 426; see also *Delaney*, 215 Cal. App. 3d at 691, 249 Cal. Rptr. at 65-66.

304. Justices Mosk and Broussard wrote separate concurring opinions. *Delaney*, 50 Cal. 3d at 817, 789 P.2d at 954, 268 Cal. Rptr. at 773 (Mosk, J., concurring); 50 Cal. 3d at 822, 789 P.2d at 958, 268 Cal. Rptr. at 777 (Broussard, J., concurring).

305. The California Supreme Court limited its discussion and holding to art. I, § 2(b) because incorporation of the provision into the California Constitution "effectively moot[ed]" § 1070 of the Evidence Code. *Id.* at 800 n.11, 789 P.2d at 942 n.11, 268 Cal. Rptr. at 761 n.11.

306. *Id.* at 796-97, 789 P.2d at 939, 268 Cal. Rptr. at 758.

307. *Id.* at 798, 789 P.2d at 940, 268 Cal. Rptr. at 759.

308. *Id.*, 789 P.2d at 941, 268 Cal. Rptr. at 760.

309. *Id.* at 799, 789 P.2d at 941, 268 Cal. Rptr. at 760.

310. *Id.* at 800, 789 P.2d at 941, 268 Cal. Rptr. at 760.

311. See, for example, *Delaney*, 215 Cal. App. 3d at 689, 249 Cal. Rptr. at 65-66, which relied on an analysis by the Senate Committee on the Judiciary of the 1974 amendment that extended § 1070 of the Evidence Code to "unpublished information." Ch. 1456, § 2, 1974 Cal. Stat. 3184 (codified at CAL. EVID. CODE § 1070 (West Supp. 1991)). The analysis emphasized, but did not require, confidentiality:

The problem that gives rise to this legislation is that . . . reporters . . . often are given information by individuals *purely* as background information to aid the reporter's understanding of the subject. In addition, investigative reporters who conduct detailed research and investigations into a subject generally use only a fraction of what they learn in an actual publication. It is this *background* information and the sources of it which are presently unprotected.

CALIFORNIA SENATE COMM. ON THE JUDICIARY, ANALYSIS OF SEN. BILL 1858 (1974) (emphasis in original).

312. *Delaney*, 50 Cal. 3d at 800, 789 P.2d at 942, 268 Cal. Rptr. at 761.

313. *Id.*

been presented to the voters when they elected to copy section 1070 into the state constitution.<sup>314</sup>

Instead, the supreme court looked to the ballot materials distributed to voters, since these were relevant in deciding whether voters intended something different than Proposition 5's actual result.<sup>315</sup> The ballot argument by initiative supporters<sup>316</sup> and the summary by the Legislative Analyst<sup>317</sup> stressed the shield law's protection of confidential newsgathering relationships. However, the court found that these statements did not limit the scope of article I, section 2(b) because they did not state that *only* confidential matters fell within the law's protection.<sup>318</sup> Emphasizing *one* of the provision's purposes did not make that goal the provision's sole purpose, the court reasoned.<sup>319</sup> Furthermore, an inference from the ballot materials could not overcome the unrestricted and facially clear language of the statute.<sup>320</sup>

By rejecting section 1070's legislative history and the Proposition 5

314. *Id.* at 800-01, 789 P.2d at 942, 268 Cal. Rptr. at 761.

315. *Id.* at 802, 789 P.2d at 943, 268 Cal. Rptr. at 762.

316. The ballot argument stated, in part:

[T]he use of confidential sources is critical to the gathering of news. . . .

This amendment merely places into the state's Constitution protection already afforded journalists by statute. That law, enacted in 1935, in clear and straightforward language, provides that reporters cannot be held in contempt of court for refusing to reveal confidential sources of information. At least six reporters in California in recent years have spent time in jail rather than disclose their sources to a judge. By giving existing law constitutional status, judges will have to give the protection greater weight before attempting to compel reporters to breach their pledges of confidentiality.

. . . In most cases, a reporter is able to reveal corruption and malfeasance within government only with the help of an honest employee. If such an individual feels that a reporter's pledge of confidentiality may be broken under the threat of jail, that person simply will not come forward with his or her information.

. . . .  
To jail a journalist because he protected his source is an assault not only on the press but on all Californians as well.

CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 3, 1980, at 19 (Argument in Favor of Proposition 5).

317. The Legislative Analyst's statement provided:

Since 1935, laws enacted by the California Legislature have protected the confidential information sources of persons employed by or connected with the news media. The law provides that such persons may *not* be held in contempt . . . for refusing to (1) disclose the source of any information obtained by them for publication, or (2) reveal any unpublished information obtained in the preparation of a news story.

. . . .  
This measure would place in the California Constitution provisions of existing law enacted by the Legislature to protect news sources, thereby granting a state constitutional protection for these rights.

*Id.* at 18 (Analysis by Legislative Analyst) (emphasis in original).

318. *Delaney*, 50 Cal. 3d at 802-03, 789 P.2d at 943-44, 268 Cal. Rptr. at 762-63.

319. *Id.*

320. *Id.*



ballot argument as interpretive guides for article I, section 2(b), the California Supreme Court endorsed the broad scope holdings in *Playboy Enterprises v. Superior Court*<sup>321</sup> and *Hammarley*<sup>322</sup> and knocked the legs from under the appeal court's decision in *Delaney* and the earlier *Liggett* and *CBS, Inc.* rulings. The *Liggett* and *CBS, Inc.* courts "paid insufficient attention to the shield law's language."<sup>323</sup> The *Farr* and *Rosato* decisions, which had limited the scope of the statutory shield law, were swept away by the supreme court in a footnote.<sup>324</sup>

In sum, the *Delaney* court concluded that nonparty witness journalists need not show that the information they withhold in court was gained under a promise of confidentiality.<sup>325</sup> Therefore, undisseminated eyewitness observations by newsgatherers in a public place fell within the sphere of "unpublished information" protected by the shield law.<sup>326</sup>

321. 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984).

322. Both courts held that "unpublished information," as used in the shield law, included all information collected by newsgatherers but not disseminated to the public, whether or not the information was gained under a promise of confidentiality. *Playboy Enters.*, 154 Cal. App. 3d at 22-23, 201 Cal. Rptr. at 214-15; *Hammarley*, 89 Cal. App. 3d at 397-98, 153 Cal. Rptr. at 612-13.

323. *Delaney*, 50 Cal. 3d at 803-04, 789 P.2d at 944-45, 268 Cal. Rptr. at 763-64.

324. *Id.* at 803 n.15, 789 P.2d at 944 n.15, 268 Cal. Rptr. at 763 n.15. The *Farr* and *Rosato* courts found the statutory shield law, § 1070 of the Evidence Code, to be an unconstitutional legislative interference with judicial power to hold parties in contempt for failing to answer questions about violations of court orders. *Farr*, 22 Cal. App. 3d at 69, 99 Cal. Rptr. at 348; *Rosato*, 51 Cal. App. 3d at 219, 124 Cal. Rptr. at 446-47. Some observers felt that placing the measure into the California Constitution eliminated separation of powers as a basis for limiting the shield law's application, see Richard A. Sipos, Comment, *California's "New" Newsmen's Shield Law and the Criminal Defendant's Right to a Fair Trial*, 26 SANTA CLARA L. REV. 219, 238 (1986); Kevane, *supra* note 174, at 546, but the effect of constitutionalizing the shield law was not addressed by the California Supreme Court until *Delaney*. It follows from the court's holding that art. I, § 2(b) of the California Constitution mooted § 1070 of the Evidence Code that the shield law's failings because of its statutory status, such as that recognized in *Farr* and *Rosato*, are also mooted. See *supra* notes 243-55 and accompanying text. The court suggested as much when it observed that § 1070 would run afoul of separation of powers doctrines only if it went beyond the scope of art. I, § 2(b):

We requested the parties to submit supplemental briefs on the issue of whether section 1070 is an unconstitutional usurpation of the California judiciary's inherent power to punish contempt. Because the scope of section 1070 is rendered moot as a practical matter by our construction of article I, section 2(b), . . . we need not and do not decide this issue, which would arise only if section 1070 were amended so that it were somehow broader than article I, section 2(b).

*Delaney*, 50 Cal. 3d at 803 n.15, 789 P.2d at 944 n.15, 268 Cal. Rptr. at 763 n.15.

325. *Delaney*, 50 Cal. 3d at 805, 789 P.2d at 945, 268 Cal. Rptr. at 764. This holding was extended to civil proceedings in which the journalist is a nonparty witness in *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 461-62, 796 P.2d 811, 816, 273 Cal. Rptr. 98, 103 (1990). See *supra* notes 226-31 and accompanying text.

326. *Delaney*, 50 Cal. 3d at 805, 789 P.2d at 945, 268 Cal. Rptr. at 764.

*c. conflicting fair trial right*

What the California Supreme Court gave journalists in *Delaney* it made very easy for criminal defendants to take away. By accepting the shield law's facially broad language, the court opened a huge umbrella of protection for information collected in journalists' memories, notes and source documents. Nevertheless, by ignoring First Amendment principles and the reasoning of the federal courts, the state high court made the *Delaney* umbrella a porous one indeed.

Qualified First Amendment newsgathering privilege had been incorporated into California law long before *Delaney*. The state supreme court had explicitly recognized the privilege in the context of defamation lawsuits,<sup>327</sup> and California courts confronted with a conflict between a criminal defendant's subpoena and a journalist's invocation of the shield law had relied for a decade on the First Amendment-based three-prong test employed in *Hammarley*.<sup>328</sup> These requirements provided a crucial safeguard against defendants' subpoenas and allowed journalists to keep their promises and retain their unpublished work product.<sup>329</sup>

Yet, in crafting its own balancing test for fair trial disputes, the *Delaney* court removed two significant, mandatory hurdles adopted by the federal and state courts, downgrading both to "factors" a judge should consider in weighing a journalist's immunity claim: the evidence sought must be (1) crucial to determining the outcome of the case,<sup>330</sup> and (2) unavailable elsewhere.<sup>331</sup> The California Supreme Court also added to the balancing test the same judicial gloss it had just removed in adopt-

327. *Mitchell*, 37 Cal. 3d at 284, 690 P.2d at 635, 208 Cal. Rptr. at 162.

328. *Hammarley*, 89 Cal. App. 3d at 399, 153 Cal. Rptr. at 614. *Hammarley* required criminal defendants seeking to overcome a claim of immunity under the shield law to show that the evidence sought is (1) relevant and necessary, (2) likely to result in the defendant's exoneration, and (3) is unavailable from other sources. *Id.*; see *supra* notes 272-79 and accompanying text.

The vast majority of federal courts have required parties seeking information from journalists to show that the evidence is (1) highly material and relevant, (2) goes to the heart of the claim, and (3) is unavailable from other sources. See *supra* notes 117-34 and accompanying text.

The federal "heart of the claim" element, applicable to all types of litigation, is comparable to the criminal "exoneration" requirement of *Hammarley*. "Heart of the claim," like guilt or innocence, is a method of determining whether the evidence is central to the determination of the *entire* case. See *supra* note 122; Brief of Real Parties in Interest at 29-30, *Delaney* (No. S006866).

329. See, e.g., *Hallissy*, 200 Cal. App. 3d at 1046, 248 Cal. Rptr. at 639 (murder defendant seeking reporter's testimony to show defendant made inconsistent statements able to get similar testimony from other sources).

330. *Delaney*, 50 Cal. 3d at 808-09, 789 P.2d at 948, 268 Cal. Rptr. at 767.

331. *Id.* at 812, 789 P.2d at 951, 268 Cal. Rptr. at 770.

ing an expansive view of the shield law's scope: henceforth, lesser protection would be accorded nonconfidential information<sup>332</sup> and eyewitness observations.<sup>333</sup>

Justice Eagleson launched the court's discussion of the fair trial-shield law conflict with the premise that "the shield law's protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive a defendant of his federal constitutional right to a fair trial."<sup>334</sup> The defendant's paramount right was unaffected by the shield law's incorporation into the state constitution.<sup>335</sup> The issue, then, was what showing a criminal defendant must make to compel disclosure of information once a journalist convinces a court that the information being withheld falls within the shield law's scope.<sup>336</sup>

The state supreme court held that a criminal defendant need only show that there was a reasonable possibility the information sought would *materially assist* his or her defense.<sup>337</sup> The evidence need not lead to acquittal or dismissal of the charges; disclosure could be ordered if a journalist's information might help a defendant avoid a more serious conviction in favor of a lesser charge, or impeach a prosecution witness, or provide mitigating evidence in the penalty phase of a capital murder trial.<sup>338</sup> The court reasoned that these aspects were included within a defendant's fair trial right.<sup>339</sup> Requiring that the evidence go to the "heart of the case," as the supreme court had done in defamation suits,<sup>340</sup> was unworkable because it forced a trial court to "attempt to divine" whether the information sought would cause a jury to acquit the defendant.<sup>341</sup> "A court [could not] be expected to have that degree of prescience."<sup>342</sup>

The *Delaney* court also rejected a second standard required in the

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332. *Id.* at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768.

333. *Id.* at 812, 789 P.2d at 951, 268 Cal. Rptr. at 770.

334. *Id.* at 805, 789 P.2d at 946, 268 Cal. Rptr. at 765.

335. *Id.* at 805-06, 789 P.2d at 946, 268 Cal. Rptr. at 765. Citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the court observed that *Delaney's* fair trial right probably was grounded on the due process guarantees of the Fourteenth Amendment, since a plurality of the United States Supreme Court found that the confrontation and compulsory process clauses of the Sixth Amendment did not apply to pretrial discovery. *Delaney*, 50 Cal. 3d at 805 n.18, 789 P.2d at 946 n.18, 268 Cal. Rptr. at 765 n.18.

336. *Delaney*, 50 Cal. 3d at 806 & n.20, 789 P.2d at 946 & n.20, 268 Cal. Rptr. at 765 & n.20.

337. *Id.* at 808-09, 789 P.2d at 948, 268 Cal. Rptr. at 767.

338. *Id.* at 809, 789 P.2d at 948-49, 268 Cal. Rptr. at 767-68.

339. *Id.* at 809, 789 P.2d at 949, 268 Cal. Rptr. at 768.

340. See *Mitchell*, 37 Cal. 3d at 280, 690 P.2d at 632, 208 Cal. Rptr. at 159.

341. *Delaney*, 50 Cal. 3d at 808-09, 789 P.2d at 948, 268 Cal. Rptr. at 767.

342. *Id.* at 809, 789 P.2d at 948-49, 268 Cal. Rptr. at 767-68.

defamation context.<sup>343</sup> no longer must the party seeking to overcome the shield exhaust all alternative sources for the needed information.<sup>344</sup> The court reasoned that the requirement was unnecessary for information not confidential or sensitive,<sup>345</sup> even though alternative sources for such evidence seemingly would be more readily available.<sup>346</sup> Furthermore, certain types of evidence never have alternative sources.<sup>347</sup> While objective information, such as the contents of a document, might be available elsewhere, percipient observations of events are unique.<sup>348</sup> Even if multiple witnesses could offer substantially similar testimony, a particular witness might have greater credibility in court.<sup>349</sup>

A trial court's determination that there is a reasonable possibility the information sought might materially assist the defense could not end its analysis, however.<sup>350</sup> A judge must go on to consider the importance of protecting the information by balancing the interests of the defendant and the newsgatherer.<sup>351</sup> In the *Delaney* court's eyes, the new test recognized journalists' rights under article I, section 2(b) and made it possible for a journalist to withhold information even after a defendant met the threshold test.<sup>352</sup> Factors to be balanced are: (1) whether the unpublished information is confidential or sensitive; (2) what interests are being protected by use of the shield law; (3) how important the information is to the defendant; and (4) whether there are alternative sources for the information.<sup>353</sup>

First, a court must consider whether the information was gained in confidence or, if not, whether it is "sensitive"—that is, whether "its disclosure would somehow unduly restrict the newsperson's access to future sources and information."<sup>354</sup> Other information is less deserving of pro-

343. *Mitchell*, 37 Cal. 3d at 282, 690 P.2d at 634, 208 Cal. Rptr. at 161.

344. *Delaney*, 50 Cal. 3d at 811-13, 789 P.2d at 950-51, 268 Cal. Rptr. at 769-70.

345. *Id.* at 812, 789 P.2d at 950, 268 Cal. Rptr. at 769; see *infra* notes 354-55 and accompanying text. The court did not explain why the hurdle should be abandoned for defendants seeking other information. See *Delaney*, 50 Cal. 3d at 812, 789 P.2d at 950, 268 Cal. Rptr. at 769.

346. See *Delaney*, 50 Cal. 3d at 811-12, 789 P.2d at 950, 268 Cal. Rptr. at 769.

347. *Id.* at 812, 789 P.2d at 951, 268 Cal. Rptr. at 770.

348. *Id.*

349. *Id.*

350. *Id.* at 809, 789 P.2d at 949, 268 Cal. Rptr. at 768.

351. *Id.*

352. *Id.* at 809 n.24, 789 P.2d at 949 n.24, 268 Cal. Rptr. at 768 n.24.

353. *Id.* at 809-13, 789 P.2d at 949-51, 268 Cal. Rptr. at 768-70.

354. *Id.* at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768. The creation of a separate category of "sensitive information" was perhaps well-intentioned, but the following example provided by Justice Eagleson may be seized upon by trial courts to severely limit the category. A city employee, who agrees to be identified, provides information to a reporter investigating corrup-

tection, since the shield law's primary purpose is to protect the ability to gather news.<sup>355</sup>

Second, a court must consider the "interests sought to be protected"—in other words, why the journalist is withholding the information, and whether that reason might be moot under the circumstances.<sup>356</sup> Justice Eagleson offered as an example a criminal defendant's attempt to compel disclosure when the defendant has been the source of the information.<sup>357</sup> The factor was otherwise characterized only as a determination of whether the policy of the shield law would be thwarted by disclosure.<sup>358</sup>

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tion in city government, but the information is not published by the time the reporter is subpoenaed to testify. *Id.* at 810 n.25, 789 P.2d at 949 n.25, 268 Cal. Rptr. at 768 n.25. Disclosing the information might cause the source to be fired and convince other sources to stop cooperating with the reporter. *Id.*

Such an example only confuses the need of journalists to protect *information* with the need to protect *sources*. A better example, and a situation that often arises with newspaper reporters, occurs when a reporter is assigned to a particular beat such as city hall, the police department, or the courthouse, or to a long-running controversy, such as abortion rights or the drug epidemic, and develops behind-the-scenes knowledge that comes with extended dealings with the people involved. A trusting *relationship* develops between the reporter and these sources and the reporter gains information without making an explicit promise of confidentiality. This might involve plans for an anti-abortion protest, or the policies of the district attorney's office in seeking death sentences in murder cases, or even the sexual relations of public figures and officials. For a variety of editorial reasons—ethics, concern about libel, or strategy—the information is not published. The sources are not confidential, and the information was not gained under a promise that it would remain confidential. However, such information should be considered "sensitive" and deserving of special consideration because disclosing it is certain to destroy the ability of that reporter—and possibly the newspaper's entire staff—to continue the *relationship* that generated the information. Other information of great importance to the newspaper's readers will be difficult to obtain because the sources will consider them untrustworthy, or at a minimum no longer unbiased observers, a status crucial to effective newsgathering.

For a discussion regarding the unspoken trust that often develops between reporters and their sources, see Blasi, *supra* note 48, at 240-43.

355. *Delaney*, 50 Cal. 3d at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768.

356. *Id.* at 810-11, 789 P.2d at 949-50, 268 Cal. Rptr. at 768-69.

357. The court reasoned that if a defendant seeks disclosure of information that the defendant provided, the need to avoid disclosure would be rendered moot and disclosure would not prejudice a reporter's newsgathering ability. *Id.* at 810, 789 P.2d at 950, 268 Cal. Rptr. at 769. The state supreme court thus disapproved of the appellate court's decision in *Hallissy*, 200 Cal. App. 3d 1038, 248 Cal. Rptr. 635, allowing a reporter in this situation to withhold information. *Delaney*, 50 Cal. 3d at 810 n.27, 789 P.2d at 950 n.27, 268 Cal. Rptr. at 769 n.27.

358. *Delaney*, 50 Cal. 3d at 810 n.27, 789 P.2d at 950 n.27, 268 Cal. Rptr. at 769 n.27. Such reasoning ignores the fact that the journalist, not the source, holds the immunity, and the interest the journalist seeks to protect might extend far beyond the relationship that journalist has with that particular source. Rather, the journalist invoking the shield law may be seeking to protect the profession's interest in a reputation of trustworthiness. See KLAIDMAN & BEAUCHAMP, *supra* note 54, at 154-55, 176. Trust is a crucial element in all reporter-source relationships: reporters trust sources to tell them the truth, and sources trust reporters to

Third, a court should consider whether the defendant exceeded the "reasonable possibility" requirement, and whether the information sought would go to the "heart," or be dispositive, of the case.<sup>359</sup> In such situations, the balance would tip in favor of disclosure.<sup>360</sup>

Finally, a court should consider whether there are alternative sources for the information sought.<sup>361</sup> In deciding whether to require exhaustion of other sources, the court must evaluate the type of information being sought, the quality of the alternative sources, and the practicality of getting the information elsewhere.<sup>362</sup>

The weight of each of these four factors must be determined case by case.<sup>363</sup> In some cases, the court noted, one factor might "be so compelling as to outweigh all the others."<sup>364</sup>

Applying its test to the facts at hand, the California Supreme Court held that Delaney clearly was entitled to the testimony of Kopetman and Bertero.<sup>365</sup> Since the police had no probable cause to search Delaney's jacket, the question of whether Delaney consented, and thus whether the brass knuckles were inadmissible evidence because they had been seized illegally, would determine whether Delaney could be convicted of the criminal charge.<sup>366</sup> Therefore, a reasonable possibility existed that the *Times* journalists' testimony would materially assist Delaney in his defense.<sup>367</sup>

Not surprisingly, the balancing test also weighed "overwhelmingly" against the journalists.<sup>368</sup> Their observations in a public place were not confidential or sensitive.<sup>369</sup> Disclosure would not damage their ability to

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accurately convey the information provided by the source and to keep confidences. *Id.* at 162. Forcing a journalist to breach a promise or disclose information that will threaten long-term relationships with sources is likely to make *other* sources hesitate to cooperate with *all* journalists. *See id.* at 164.

359. *Delaney*, 50 Cal. 3d at 811, 789 P.2d at 950, 268 Cal. Rptr. at 769.

360. *Id.*

361. *Id.* at 811-13, 789 P.2d at 950-51, 268 Cal. Rptr. at 769-70.

362. *Id.* at 812-13, 789 P.2d at 951, 268 Cal. Rptr. at 770.

363. *Id.* at 813, 789 P.2d at 951, 268 Cal. Rptr. at 770.

364. *Id.* The court also stated that an in camera hearing, in which the trial court would review and possibly limit disclosure of the information, would be appropriate only if the journalist invoking the shield law made a legitimate claim that the information sought was confidential or sensitive. *Id.* at 814, 789 P.2d at 952, 268 Cal. Rptr. at 771.

365. *Id.*

366. *Id.* at 815, 789 P.2d at 953, 268 Cal. Rptr. at 772.

367. *Id.* at 814-15, 789 P.2d at 952, 268 Cal. Rptr. at 771. The court noted that Delaney also could have met the "heart of the case" requirement proposed by Kopetman and Bertero. *Id.*

368. *Id.* at 815, 789 P.2d at 953, 268 Cal. Rptr. at 772.

369. *Id.*

gather news.<sup>370</sup> The information was so important to the defendant that it was likely to determine the outcome of the case.<sup>371</sup> No meaningful alternative source was available because the police officers and Delaney's companion could not offer the disinterested testimony that could be provided by the journalists.<sup>372</sup>

The municipal court had "struck the correct balance," according to the California Supreme Court.<sup>373</sup> Kopetman and Bertero had to "accept the civic responsibility imposed on all persons who witness alleged criminal conduct"<sup>374</sup> and testify. The court of appeal was affirmed<sup>375</sup> and the

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370. *Id.* The court reasoned that since both Delaney and the prosecution were seeking the journalists' testimony, "it cannot be said the parties or anyone else would be reluctant to provide these reporters with future information based on a belief that the reporters had breached a confidence or divulged sensitive information." *Id.* By focusing on the parties in the case at hand, the court underestimated the broad impact on newsgathering when journalists testify. See *supra* note 354 & *infra* notes 422-49 and accompanying text.

371. *Delaney*, 50 Cal. 3d at 815, 789 P.2d at 953, 268 Cal. Rptr. at 772.

372. *Id.* at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772.

373. *Id.* at 816, 789 P.2d at 953, 268 Cal. Rptr. at 772.

374. *Id.*

375. Justices Panelli, Kennard and Kremer, a justice on the California Court of Appeal, joined in Justice Eagleson's majority opinion. *Id.* at 817, 789 P.2d at 954, 268 Cal. Rptr. at 773. Chief Justice Lucas concurred in the portion of the majority opinion that discussed the competing rights of Delaney and the press and crafted a balancing test. *Id.*

Justice Mosk wrote a separate concurring opinion rejecting the majority's balancing test and arguing that a court should not inquire into the value of the information withheld by a reporter once it is determined the information falls within the protection of art. I, § 2(b) of the California Constitution. *Id.* at 817-18 & n.1, 789 P.2d at 954-55 & n.1, 268 Cal. Rptr. at 773-74 & n.1 (Mosk, J., concurring). A court should require the defendant to show there are no alternative sources for the information; only then should the shield be "pierced." *Id.* at 821, 789 P.2d at 957, 268 Cal. Rptr. at 776 (Mosk, J., concurring). This requirement preserves press autonomy while accommodating a defendant's fair trial right. *Id.* (Mosk, J., concurring). Because testimony of an eyewitness cannot be duplicated, and because Kopetman and Bertero were precipient witnesses to the search, Delaney was entitled to their testimony. *Id.* at 822, 789 P.2d at 957-58, 268 Cal. Rptr. at 776-77 (Mosk, J., concurring).

Justice Broussard wrote a separate concurring opinion wherein he argued that statutory antecedents should be used in interpreting a related initiative. *Id.* at 822-23, 789 P.2d at 958, 268 Cal. Rptr. at 777 (Broussard, J., concurring). Nevertheless, he concluded that the history of § 1070 of the Evidence Code supported the conclusion that nonconfidential information fell within the scope of art. I, § 2(b) of the California Constitution. *Id.* at 823, 789 P.2d at 958, 268 Cal. Rptr. at 777 (Broussard, J., concurring). Chief Justice Lucas joined in this portion of the concurring opinion. *Id.* at 825, 789 P.2d at 960, 268 Cal. Rptr. at 779 (Broussard, J., concurring). Justice Broussard went on to advocate a balancing test under which a criminal defendant first must show that the unpublished information he seeks would be "of some assistance" and no alternative sources are available. *Id.*, 789 P.2d at 959, 268 Cal. Rptr. at 778 (Broussard, J., concurring). Even after this showing, however, a court should deny access if it "finds that the defendant's need for the information is not particularly great while the state's interest in affording a reporter immunity under the circumstances is compelling." *Id.* No such compelling interest was present in *Delaney*, Justice Broussard concluded. *Id.*, 789 P.2d at 960, 268 Cal. Rptr. at 779 (Broussard, J., concurring).

petitions for writs of habeas corpus were denied.<sup>376</sup>

#### *D. Other Problems*

Developments since *Delaney v. Superior Court*<sup>377</sup> continue to highlight the shield law's failings. By strictly limiting the law's protection to contempt proceedings,<sup>378</sup> the California Supreme Court has opened the door to other, more obscure sanctions that serve the same punitive function as contempt yet may fall outside the scope of a court's contempt power.<sup>379</sup> Whether these sanctions will prove effective for litigants and judges seeking testimony from journalists who are nonparty witnesses is unclear.

In *New York Times Co. v. Superior Court*,<sup>380</sup> the state supreme court held that the shield law does not preclude litigants from using a statute that permits recovery, through a separate civil action, of \$500 plus actual damages from any witness who disobeys a subpoena.<sup>381</sup> The court reasoned that the enactment of the shield law did not implicitly repeal the statute because article I, section 2(b) simply prohibited holding news-

376. *Id.* at 817, 789 P.2d at 954, 268 Cal. Rptr. at 773. Kopetman and Bertero returned to Long Beach Municipal Court on August 7, 1990, and the suppression hearing was resumed. Telephone Interview with Glen A. Smith, Senior Staff Counsel, The Times Mirror Co. (July 24, 1991). Kopetman testified that she did not remember any question by the police officers seeking permission to search Delaney's jacket. *Id.* Bertero testified that he recalled only that an officer asked Delaney if the jacket was his before it was searched. *Id.* At the conclusion of the hearing, Judge Elvira S. Austin ruled that the officers did not have reasonable suspicion to even question Delaney, suppressed the brass knuckles and dismissed the charge. *Id.* The journalists' testimony therefore was irrelevant to the disposition of Delaney's case.

377. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

378. *Id.* at 797 n.6, 789 P.2d at 939 n.6, 268 Cal. Rptr. at 758 n.6.

379. The *Mitchell v. Superior Court* holding that qualified First Amendment privilege is available when newsgatherers are threatened with sanctions other than contempt should apply to these punitive measures. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 279, 690 P.2d 625, 632, 208 Cal. Rptr. 152, 159 (1984). However, neither the California Supreme Court in *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990), nor the trial court in *People v. Powell*, No. BA 035498 (Cal. Super. Ct. L.A. County, May 30, 1991), addressed the *Mitchell* qualified privilege balancing test. The decisions in *New York Times Co.* and *Powell* are discussed *infra* at notes 380-89 and accompanying text. See *supra* notes 198-208 and accompanying text for a discussion of the *Mitchell* test.

380. 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990). See *supra* notes 226-31 and accompanying text for a discussion of the facts of *New York Times Co.* and the court's holding regarding the shield law's protection of nonparty journalists subject to contempt.

381. *New York Times Co.*, 51 Cal. 3d at 464, 796 P.2d at 818, 273 Cal. Rptr. at 105; CAL. CIV. PROC. CODE § 1992 (West 1983). Section 1992 of the California Code of Civil Procedure provides that "[a] witness disobeying a subpoena also forfeits to the party aggrieved the sum of five hundred dollars (\$500), and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action." CAL. CIV. PROC. CODE § 1992.



gatherers in contempt.<sup>382</sup> To extend the shield law's protections for non-party journalists to other sanctions "would blur the distinction between a privilege and an immunity, a distinction expressly declared by the Legislature and adopted by the voters."<sup>383</sup>

The court brushed off the newspaper's argument that the civil penalty frustrated the purpose of the shield law.<sup>384</sup> The sanction was "virtually ineffectual" because litigants unhappy about uncooperative reporter witnesses would be unlikely to file a separate civil suit to recover just \$500, and it is "doubtful that a litigant could prove substantial damages as a result of a newsperson's refusal to provide discovery."<sup>385</sup>

While the state supreme court considered the availability of the civil penalty in *New York Times Co.* to be "largely academic,"<sup>386</sup> its lack of concern about the shield law's purpose may encourage courts and litigants to punish newsgatherers in other ways. Relying on *New York Times Co.*, a trial judge recently fined a newspaper reporter \$1500 for defying the court and refusing to identify the person who had supplied the reporter with a police internal affairs report that was subject to a gag order.<sup>387</sup> The judge threatened to impose another \$1500 fine each day

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382. *New York Times Co.*, 51 Cal. 3d at 463, 796 P.2d at 817, 273 Cal. Rptr. at 104; see CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070 (West Supp. 1991).

383. *New York Times Co.*, 51 Cal. 3d at 463, 796 P.2d at 817, 273 Cal. Rptr. at 104 (citations omitted). See *supra* notes 191-95 and accompanying text for a discussion of the distinction between a privilege, which prohibits all sanctions, and an immunity from contempt.

384. *New York Times Co.*, 51 Cal. 3d at 463-64, 796 P.2d at 817-18, 273 Cal. Rptr. at 104-05.

385. *Id.* at 464, 796 P.2d at 817-18, 273 Cal. Rptr. at 104-05. The court noted that it had found only four reported decisions involving § 1992 in the 118 years since its enactment. *Id.*, 796 P.2d at 818, 273 Cal. Rptr. at 105. "The simple economics of modern litigation essentially preclude such an action." *Id.*

Neither litigant in the underlying lawsuit filed a § 1992 action after the *New York Times Co.* ruling. Telephone Interview with C. Michael Cooney of Price, Postel & Parma, Counsel for the *New York Times Co.* (Aug. 22, 1991).

386. *New York Times Co.*, 51 Cal. 3d at 464, 796 P.2d at 817, 273 Cal. Rptr. at 104.

387. Lois Timnick, *Times Reporter Refuses to Tell Source, Is Fined*, L.A. TIMES, May 31, 1991, at A1. A *Los Angeles Times* reporter, Richard A. Serrano, had written an article reporting that he had obtained a copy of a 314-page Los Angeles Police Department report on the internal affairs investigation into the much-publicized videotaped beating of motorist Rodney King by police officers. Richard A. Serrano, *3 in King Beating Say They Feared for Lives*, L.A. TIMES, May 21, 1991, at A1. The report had been sealed by the judge presiding over criminal charges against four officers accused of assaulting King. Timnick, *supra*, at A1, A28; see *People v. Powell*, No. BA 035498 (Cal. Super. Ct. L.A. County, Apr. 30, 1991) (order sealing defendants' personnel records).

In an effort to identify who had violated his order by disclosing the report, the judge asked Serrano if he had obtained the report from any person subject to the order and, if so, who that person was. Record at 21, *People v. Powell*, No. BA 035498 (Cal. Super. Ct. L.A. County, May 30, 1991). Serrano refused to answer. *Id.* The judge acknowledged that Serrano could not be held in contempt. *Id.* at 23. See *supra* notes 243-55 and accompanying text for discus-

for as long as the reporter remained silent,<sup>388</sup> but later declined to levy additional fines.<sup>389</sup>

Another ominous event for journalists trying to go about their business without government interference occurred last summer when a local prosecutor scoured the telephone records of every phone user in southwestern Ohio in an attempt to identify a newspaper reporter's confidential sources.<sup>390</sup> Because information was not being sought from the reporter, the inquiry was not prohibited by Ohio's shield law.<sup>391</sup> Such an investigation, which denies journalists and their employers the opportunity to object in court, illustrates the technological limitations of a newsgatherer's privilege.<sup>392</sup>

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sions of similar court inquiries in the *Farr* and *Rosato* cases and *supra* note 324 and accompanying text for a discussion regarding the effect of placing the shield law in the state constitution on the *Farr* and *Rosato* holdings.

The judge ordered Serrano to answer the questions. Record at 90, *Powell* (No. BA 035498) (May 30, 1991). When Serrano refused, the judge imposed a \$1500 sanction under § 177.5 of the California Code of Civil Procedure. *Id.*; CAL. CIV. PROC. CODE § 177.5 (West Supp. 1991). That section empowers a judicial officer, upon notice and an opportunity to be heard, "to impose reasonable money sanctions, not to exceed fifteen hundred dollars (\$1,500), notwithstanding any other provision of law, . . . for any violation of a lawful court order by a person done without good cause or substantial justification." CAL. CIV. PROC. CODE § 177.5.

388. Record at 112-14, *Powell* (No. BA 035498) (May 30, 1991); Timnick, *supra* note 387, at A1.

389. Record at 119, *People v. Powell*, No. BA 035498 (Cal. Super. Ct. L.A. County, May 31, 1991); Lois Timnick, *Judge Limits Fine Against Times Reporter*, L.A. TIMES, June 1, 1991, at A1. The judge relented after attorneys for Serrano and the *Los Angeles Times* argued that he was prohibited from repeatedly sanctioning the same violation of his order. Record at 127, *Powell* (No. BA 035498) (May 31, 1991); Brief of *Los Angeles Times* in Opposition to Repeated Imposition of Daily Fines at 4-12, *People v. Powell*, No. BA 035498 (Cal. Super. Ct. L.A. County, May 31, 1991). Serrano, who remained silent, was ordered to pay the single \$1500 fine, however. Timnick, *supra*, at A1; Record at 119, 127, *Powell* (No. BA 035498) (May 31, 1991).

390. Randall Rothenberg, *Search for News Leak Spurs Ohio Phone Sweep*, N.Y. TIMES, Aug. 16, 1991, at A10. The Hamilton County, Ohio, prosecutor obtained a grand jury subpoena for the telephone records of every person in Area Code 513 who had called *Wall Street Journal* reporter Alecia Swasy at her home or office in Pittsburgh between March 1, 1991, and June 15, 1991. *Id.* The prosecutor was acting on a complaint by Procter & Gamble Co., which claimed that employees who contacted Swasy violated an Ohio statute making it a misdemeanor to disclose any confidential corporate matter or information without a company's consent. *Id.* Procter & Gamble was angered by articles written by Swasy reporting that a senior executive was under pressure to resign and the corporation was considering selling some unprofitable divisions. *Id.* Cincinnati Bell complied with the subpoena after apparently searching 655,297 phone numbers in an area covering 1156 square miles. *Id.* Swasy and the *Journal* were not informed of the investigation. *Id.*

391. OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Anderson 1981).

392. News of the investigation prompted an immediate outcry from journalists and their lawyers. See, e.g., Associated Press, *Procter, Journal Are At Odds Over Suspected News Leaks*, CHI. TRIB., Aug. 13, 1991, Business section, at 3; Rita Ciolli & Dottie Enrico, *P&G Tries to Plug (News) Leak*, NEWSDAY, Aug. 13, 1991, at 17; Pat Guy, *Procter & Gamble Hunts In-*

## VI. REDISCOVERING THE FIRST AMENDMENT

A. *The Constitution and the Changing Role of the Press*

In the increasing murkiness of post-*Branzburg v. Hayes*<sup>393</sup> First Amendment privilege jurisprudence,<sup>394</sup> *Delaney v. Superior Court*<sup>395</sup> offered the California Supreme Court an opportunity to recognize and protect the news media's crucial role in a complex society governed by a secretive, omnipresent government. The tool was available: a clearly written state constitutional provision,<sup>396</sup> founded on the First Amendment,<sup>397</sup> which by its plain terms forbade inquiry into the newsgathering process by parties lacking claims they were harmed by that process.<sup>398</sup> But the court used facts testing the outer limits of the privilege,<sup>399</sup> both under the state shield law and First Amendment doctrine, to eviscerate the protection for working journalists.

The search and arrest of Sean Patrick Delaney presented an easy case for forcing disclosure: two people employed by a newspaper witness a public event, and their testimony could decide whether a person charged with a crime would be punished or go free.<sup>400</sup> Because the testimony did not go directly to the defendant's guilt or innocence, and because the only other witnesses harbored natural biases or were parties to the case,<sup>401</sup> the facts gave the court the occasion to remove two signifi-

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*formant*, USA TODAY, Aug. 13, 1991, at 1B; *Since When Is News A Crime?*, L.A. TIMES, Aug. 17, 1991, at B15. First Amendment attorney Floyd Abrams characterized the investigation as "an effort to circumvent [the Ohio shield] law, designed to permit journalists and sources to talk freely." Guy, *supra*, at 1B. Paul E. Steiger, the *Journal's* managing editor, blasted the investigation as "an effort to intimidate [Procter & Gamble] employees from talking to reporters and to circumvent the protections that either shield laws or the First Amendment provide." Randall Rothenberg, *Employee Phone Records Examined in Company's Search for News Leaks*, N.Y. TIMES, Aug. 13, 1991, at A13.

393. 408 U.S. 665 (1972).

394. See *supra* notes 117-34 and accompanying text for a discussion of qualified First Amendment privilege.

395. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

396. CAL. CONST. art. I, § 2(b); *Delaney*, 50 Cal. 3d at 798, 789 P.2d at 941, 268 Cal. Rptr. at 760.

397. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 276, 690 P.2d 625, 629, 208 Cal. Rptr. 152, 156 (1984) ("We cannot ignore or subordinate the First Amendment values furthered by the protection of confidential sources and information."); *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 399, 153 Cal. Rptr. 608, 614 (1979) ("[T]he statute under which petitioner claims evinces a strong legislative policy in favor of giving the widest possible effect to the privilege consistent with federal and state constitutional imperatives.").

398. CAL. CONST. art. I, § 2(b); see *supra* notes 198-208 & 226-31 and accompanying text.

399. See *supra* notes 287-300 and accompanying text.

400. *Delaney*, 50 Cal. 3d at 814, 789 P.2d at 952, 268 Cal. Rptr. at 771.

401. In addition to Kopetman and Bertero, there were six witnesses: four police officers, Delaney and Delaney's girlfriend. Opening Brief on the Merits for Real Parties in Interest at

cant hurdles that had allowed many journalists to avoid the choice of violating their professional ethics or going to jail. Henceforth, criminal defendants need not show that they have exhausted alternative sources<sup>402</sup> or that the information sought might exonerate them.<sup>403</sup> By ignoring the teachings of the federal courts since *Branzburg*, in which society's interests in the unrestricted flow of information and an independent watchdog press receive great weight,<sup>404</sup> the California Supreme Court cut the state shield law from its moorings and violated the demands of the United States Constitution.<sup>405</sup>

First Amendment rights are not held by journalists as individuals, but as *surrogates*<sup>406</sup> for a public that increasingly depends on the news

7, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990) (No. S006866).

402. *Delaney*, 50 Cal. 3d at 812-13, 789 P.2d at 950-51, 268 Cal. Rptr. at 769-70.

403. *Id.* at 809, 789 P.2d at 948, 268 Cal. Rptr. at 767.

404. See *TRIBE*, *supra* note 2, § 12-2, at 789-91. See *infra* note 424 for Justice Powell's discussion of society's interest in unrestricted information.

405. A striking aspect of the *Delaney* opinion is the California Supreme Court's failure to even discuss First Amendment privilege; the court chose instead to restrict its analysis to art. I, § 2(b) of the state constitution, and its discussion of constitutional rights was limited to the criminal defendant's right to a fair trial. *Delaney*, 50 Cal. 3d at 805-09, 789 P.2d at 945-49, 268 Cal. Rptr. at 764-68. The court treated the shield law as if it displaced the protections accorded journalists under the First Amendment, and dismissed *Branzburg* and its progeny with a footnote:

There has been considerable debate as to whether the [United States Supreme Court] as a whole in *Branzburg v. Hayes* . . . recognized a qualified privilege. . . . In *Mitchell v. Superior Court*, . . . we concurred in the observation by some other courts that Justice Powell's position was the "minimum common denominator" of *Branzburg* and that the decision therefore does not *preclude* a qualified privilege. We did not decide the question of whether *Branzburg* requires a privilege in some cases. Because *Branzburg* is not dispositive of the present case, we need not linger over the troublesome question of its scope and meaning.

*Id.* at 795 n.3, 789 P.2d at 938 n.3, 268 Cal. Rptr. at 757 n.3 (emphasis in original).

Kopetman and Bertero did not ask the court to apply First Amendment privilege, choosing instead to stress the broad protection afforded by the shield law. Interview with Rex S. Heinke of Gibson, Dunn & Crutcher, Counsel for Kopetman and Bertero (Mar. 5, 1991). Nevertheless, by ignoring the First Amendment principles recognized in *Branzburg* and the cases interpreting it, including its own *Mitchell* decision, the California Supreme Court undercut the protections accorded the press under the United States Constitution. See *supra* notes 92-134 and accompanying text.

406. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); see also *Branzburg*, 408 U.S. at 721 (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595 n.12 (1st Cir. 1980) (observing that First Amendment rights, "while lodged in the reporter and his publisher, in reality reflect an underlying interest of the public. . . . 'The issue is the public's right to know. That right is the reporter's by virtue of the proxy which the . . . First Amendment gives to the press in behalf of the public.'" (quoting A. BICKEL, *THE MORALITY OF CONSENT* 85 (1975))).

media as its window to the world.<sup>407</sup> The United States Supreme Court has recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open,"<sup>408</sup> and that free discussion of government affairs is impermissibly inhibited by state intrusion into the editorial process.<sup>409</sup> Even the hostile plurality in *Branzburg* acknowledged that "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>410</sup> Moreover, in *Richmond Newspapers, Inc. v. Virginia*,<sup>411</sup> the Court held that the First Amendment safeguarded the *newsgathering process*, rather than simply the right to publish.<sup>412</sup>

When it announced in *United States v. Nixon*<sup>413</sup> that "[t]he need [of litigants] to develop all relevant facts . . . is both fundamental and comprehensive,"<sup>414</sup> the Supreme Court limited compelled disclosure to the rules of evidence.<sup>415</sup> Furthermore, the Court has declared off-limits those persons who are protected by constitutional, common law and statutory privileges.<sup>416</sup>

407. Professor Baker argues that recognizing an evidentiary privilege for journalists gives them only a constitutionally mandated "defensive right." Baker, *supra* note 6, at 840. "The checking function of the press clearly requires independence from government . . . . Defensive protection . . . is vital to protecting the press's capacity to expose government." *Id.* This protection preserves institutional autonomy; it "would not give the press any special affirmative privilege to act or to obtain information or resources. It merely would prohibit government from requisitioning the products of the proper activities of the press." *Id.* at 850.

408. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

409. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

410. *Branzburg*, 408 U.S. at 681.

411. 448 U.S. 581 (1980).

412. *Id.* at 576. Justice Stevens observed:

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. . . .

. . . . Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

*Id.* at 582-83 (Stevens, J., concurring).

413. 418 U.S. 683 (1974).

414. *Id.* at 709.

415. *Id.*

416. *United States v. Bryan*, 339 U.S. 323, 331-32 (1950). In his concurring opinion in *Delaney*, Justice Mosk noted:

The rights of confrontation and compulsory process under the Sixth Amendment, and the more general right to a fair trial under the Fifth Amendment, are not absolute. Rather, they are exercised in a framework of state law privileges, immunities, and rules of evidence that sometime block access to information needed by the defendant. (See *Chambers v. Mississippi* [410 U.S. 284, 302-03 (1973)], where the United States Supreme Court, in striking down a hearsay rule on due process grounds, announced that its holding does not "signal any diminution in the respect

The Court has declared that the First Amendment bars government from interfering in any way with a free press.<sup>417</sup> To limit the interference that inevitably occurs when journalists are forced to testify or disclose their work product, courts have recognized a newsgathering privilege under the Constitution<sup>418</sup> and common law.<sup>419</sup> Such a privilege protects the news media from retaliation and the appropriation of its work product by an antagonistic government.<sup>420</sup> This protection can be overcome only by a showing that the evidence sought is material, determinative of the case, and unavailable elsewhere.<sup>421</sup>

If consistently applied, this qualified privilege provides a First Amendment safety net that allows reporters to gather news with the assurance that the courts will not inquire into their activities unless there is a clear and pressing need. The California Supreme Court rolled up that net in *Delaney*, however.<sup>422</sup> The threat of compelled disclosure whenever a court decides there is a reasonable possibility that a journalist might materially assist a criminal defendant provides no assurance to news sources that a journalist's promise can ever be kept.<sup>423</sup>

The news media's service as representative and conduit of informa-

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traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."]) While consistency has not been a hallmark in this area, courts have been extremely reluctant to make incursions into state law testimonial privileges . . . on Sixth Amendment grounds.

*Delaney*, 50 Cal. 3d at 818-19, 789 P.2d at 955, 268 Cal. Rptr. at 774 (Mosk, J., concurring).

417. *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

418. See *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981); *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); *Mitchell*, 37 Cal. 3d 268, 279, 690 P.2d 625, 631, 208 Cal. Rptr. 152, 158.

419. See *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979), where the Third Circuit Court of Appeals grounded a qualified newsgathering privilege in common law and Rule 501 of the Federal Rules of Evidence, which permits federal courts to recognize privileges "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. Courts relying on federal common law draw on the same constitutional policies and use the same analysis as those recognizing a privilege under the First Amendment, however. FRANKLIN & ANDERSON, *supra* note 91, at 601.

California courts recognizing a newsgathering privilege outside the shield law must rely directly on the First Amendment because the California Evidence Code prohibits the creation of privileges not enacted by statute. See CAL. EVID. CODE § 911 (West 1966); *Mitchell*, 37 Cal. 3d at 274 n.3, 690 P.2d at 628 n.3, 208 Cal. Rptr. at 155 n.3.

420. *Baker*, *supra* note 6, at 839.

421. See *supra* notes 117-34 and accompanying text.

422. See *supra* notes 327-76 and accompanying text.

423. See FRANKLIN & ANDERSON, *supra* note 91, at 598:

If the privilege works because the source relies on it in deciding whether to disclose, or because the reporter relies on it in deciding whether to promise confidentiality, it will be effective only to the extent that it enables the decision-maker . . . to predict in advance whether the reporter can be ordered to disclose.

*Id.*

tion for the citizenry must be considered in the analysis of any law that affects newsgathering.<sup>424</sup> Sources who are at risk and are aware of the illusory nature of promises of confidentiality under California law are unlikely to confide in reporters.<sup>425</sup> Unpredictable application of the shield law therefore diminishes the flow of information to the public and violates the First Amendment.<sup>426</sup> A state statute that unjustifiably inter-

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424. As Justice Powell observed in *Saxbe v. Washington Post Co.*:

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.

417 U.S. 843, 863 (1974) (Powell, J., dissenting).

425. "[A]n unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information." *Branzburg*, 408 U.S. at 728 (Stewart, J., dissenting); accord *Mitchell*, 37 Cal. 3d at 279, 690 P.2d at 631, 208 Cal. Rptr. at 158 ("A confidential source . . . might well be deterred by the threat that his identity and information might be made public.").

426. As Justice Mosk observed in *Delaney*, a test that balances the interests of criminal defendants and journalists, as espoused by the *Delaney* majority, runs counter to the dictates of the federal and state constitutions because *all* information outside the boundaries of that necessary to give the defendant a fair trial is protected by the shield law. *Delaney*, 50 Cal. 3d at 818, 789 P.2d at 955, 268 Cal. Rptr. at 774 (Mosk, J., concurring). Justice Mosk advocated a two-part test in which a criminal defendant seeking evidence from a journalist must show (1) there is a reasonable possibility the evidence will materially assist the defense; and (2) there are no alternative sources for the evidence. *Id.*, 789 P.2d at 954, 268 Cal. Rptr. at 774 (Mosk, J., concurring).

The alternative-source rule is a pragmatic way to reconcile the defendant's rights and those of the press. Justice Mosk reasoned:

When full disclosure can be accomplished without interfering with the reporter's privilege, the defendant will be able to receive as fair a trial as the state can ensure, without having to resort to a breach of the reporter's privilege.

....  
[T]he alternative-source rule remains focused on a single decisive question: does the defendant need the information to obtain a fair trial? The alternative-source rule also incorporates a functional approach to the defendant's fair trial rights, based on the recognition that these rights exist within a framework of state law privileges and immunities. What one commentator stated of the communications privilege applies at least equally to the reporter's immunity: "A communications privilege would be of little value if a [criminal] defendant could override it whenever its invocation concealed evidence of *some* probative value. Courts must respect the legislative judgment that in some situations the social policy underlying a privilege should require that litigants be denied access to otherwise admissible evidence. . . ."

*Id.* at 819-20, 789 P.2d at 956, 268 Cal. Rptr. at 775 (Mosk, J., concurring) (quoting Robert Weisberg, Note, Defendant v. Witness: *Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 966 (1978)).

feres with First Amendment freedoms<sup>427</sup> or with the "public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect"<sup>428</sup> cannot pass constitutional muster.

*Delaney's* outcome was a natural result of the California Supreme Court's decision to ignore the shield law's First Amendment foundations.<sup>429</sup> While promises of confidentiality are important to newsgathering, the emphasis is better placed on the preservation of press autonomy.<sup>430</sup> If the constitutional principle of freely flowing information—often requiring the use of anonymous sources—is emphasized, a testimonial privilege logically is limited to information gained under a promise of confidentiality.<sup>431</sup> However, by compelling newsgatherers to testify and disclose work materials, the courts also intrude into the constitutionally protected editorial process,<sup>432</sup> transforming journalists into inexpensive tools for the government and private litigants pursuing their own interests in an adversarial setting.<sup>433</sup> Such an approach compromises the independence of the press.

Furthermore, the judicial erosion of the California shield law ignores the changing role of the news media and runs counter to the public will. The *Branzburg* plurality disputed the value of agreements by reporters that concealed from grand juries the criminal conduct of news sources.<sup>434</sup> Today, however, confidentiality agreements are used primarily to gain information from government employees, not wrongdoers seeking to hide

427. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

428. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

429. See *supra* note 405.

430. See *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277, 279 (N.Y. 1988). The New York Court of Appeals observed that press autonomy would be threatened by litigants who used the newsgathering resources of the press for their private purposes. *Id.* "The practical burden on time and resources as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press." *Id.*

431. See *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988):

When there is no confidential source or information at stake, the identification of First Amendment interests is a more elusive task. . . . We have been referred to no authoritative sources demonstrating or explaining how any chilling effect could result from the disclosure of statements made for publication without any expectation of confidentiality.

*Id.*

432. *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

433. See *Delaney*, 50 Cal. 3d at 821, 789 P.2d at 957, 268 Cal. Rptr. at 776 (Mosk, J., concurring); see also *Loadholtz v. Fields*, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975) ("The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants.").

434. *Branzburg*, 408 U.S. at 692-93.



criminal conduct behind the journalist's privilege.<sup>435</sup> Rather than cooperating with government, which frequently desires to hide the truth, journalists have an obligation to seek truth independent of, and often in conflict with, government.<sup>436</sup>

Acknowledging this watchdog role, the United States Supreme Court has held that a free press cannot be required to rely solely on the government's willingness to supply it with information.<sup>437</sup> Neither should the press be required to rely on the sufferance of government and the courts in gathering information and making editorial judgments regarding what should, and should not, be published.<sup>438</sup> The Court has also declared that journalists cannot be punished for publishing truthful, legally obtained information unless the government demonstrates that the sanction is "overwhelmingly necessary"<sup>439</sup> to advance an interest of the "highest order."<sup>440</sup> Therefore, only under the rarest, most compelling of circumstances should a newsgatherer be forced to sacrifice his or

435. Langley & Levine, *supra* note 135, at 25-26.

436. Journalism's break with government is well illustrated by the decision of *The New York Times* to publish the Pentagon Papers, described at *supra* note 48. See HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR 14, 30, 34 (1980). In publishing the "top secret" report, the preeminent newspaper made clear that it "no longer was handmaiden, supporter, crony, adherent, bondsman, counselor or confidant to 'government' but was itself an independent power with independent rights, independent judgment and an independent responsibility." *Id.* at 14.

In *Branzburg*, Justice Stewart emphasized the increasing necessity for an independent press "[a]s private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount." 408 U.S. at 727 (Stewart, J., dissenting). Harrison Salisbury, longtime editor and correspondent for *The New York Times*, similarly emphasized this critical role of the news media:

The role of the press ha[s] been redefined by Watergate, by the Pentagon Papers, by [*New York Times Co. v. Sullivan*], by the new but scarcely tested function of the nation's journalists as surrogates of the public in monitoring the new hippopotami which now strewed the landscape—the bureaucracies which had burgeoned beyond human imagination, the imperial presidency, the military-industrial complex, the intelligence community, the welfare state, the supra-national corporations, the aggregates of power, vested influence and pervasive authority in whose presence the ordinary citizen [is] little more than an intelligent pygmy.

SALISBURY, *supra*, at 447.

437. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979).

438. See *Tornillo*, 418 U.S. at 258. The Supreme Court held:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

*Id.*

439. *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1988).

440. *Daily Mail*, 443 U.S. at 103. The Supreme Court repeatedly has expressed concern that punishment will cause media "timidity and self-censorship" contrary to First Amendment

her constitutionally protected independence on the altar of an adversarial judicial system.

The public considers newsgatherers to be highly professional, and not abusers of their rights.<sup>441</sup> The public attributes the failings of the news media to external factors, including pressure from special interests and interference by government, rather than journalists' biases or inadequate skills.<sup>442</sup> It is through the use of confidential sources, which the public approves,<sup>443</sup> that journalists can function with independence.<sup>444</sup> In California, the public's desire for an independent press free from judicial intrusion was demonstrated in the overwhelming vote for Proposition 5, which placed the newsgatherer's shield law in the state constitution.<sup>445</sup>

In sum, compelled disclosure of sources and unpublished information undercuts journalists' autonomy, by making them private investigators for litigants,<sup>446</sup> and their effectiveness in gathering news, by making

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interests. *Florida Star*, 491 U.S. at 535-36; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

441. *THE TIMES MIRROR CO.*, *supra* note 46, at 10. A Gallup Organization poll found that seven out of every 10 Americans consider journalists "highly professional." *Id.* at 26. Nine out of 10 express a favorable opinion of the nation's press. *Id.* at 23.

442. *Id.* at 31-33.

443. *Id.* at 36. Almost eight in 10 people feel that "sometimes a reporter should be allowed to keep his source confidential if that is the only way he can get his information." *Id.* Other studies have found that the public gives high credibility ratings to unnamed sources, and that news consumers perceive a controversial story to be more accurate and fair when *no* source or an *unnamed* source is quoted than if the story quotes a *named* source or two opposing named sources. K. Tim Wulfemeyer, *How and Why Anonymous Attribution is Used by Time and Newsweek*, 62 JOURNALISM Q. 81, 82 (1985).

444. *THE TIMES MIRROR CO.*, *supra* note 46, at 33. "The public, apparently, sees the sins of the press mostly as the result of external forces—audience, interest groups, government and advertisers (63 percent)—rather than internal factors—personal bias, newspeople's backgrounds and budgets for news operations. In other words, poor performance is a consequence of dependence." *Id.*

445. *Playboy Enters. v. Superior Court*, 154 Cal. App. 3d 14, 27, 201 Cal. Rptr. 207, 217-18 (1984); *see supra* notes 164-74 and accompanying text.

446. Monk, *supra* note 50, at 15; *see supra* notes 66-70 and accompanying text. The Reporters Committee for Freedom of the Press contends that "[s]ome litigants are simply lazy. It is often simpler and cheaper to compel journalists to reveal their sources than to conduct investigations to find witnesses and then to subpoena those witnesses to testify." CONFIDENTIAL SOURCES, *supra* note 9, at 2. Many journalists complain that the information sought from them is often cumulative and its value is frequently overestimated. Blasi, *supra* note 48, at 261-62. An extreme example occurred when a plaintiff who claimed injuries suffered at a music festival attended by 85,000 people subpoenaed a *Chicago Tribune* reporter to testify about the crowded conditions. *Bousquet v. City of Chicago, NEWS MEDIA & THE LAW*, June-July 1982, at 36 (Cir. Ct. Cook County). The trial judge quashed the subpoena. *Id.*

them untrustworthy.<sup>447</sup> In destroying the ability of reporters to make reliable promises, the courts impermissibly interfere with the news media's service as a "powerful antidote" to the abuse of government power.<sup>448</sup> Compelled disclosure certainly runs counter to the great respect the United States Supreme Court has accorded the press as "the handmaiden of effective judicial administration."<sup>449</sup>

### B. Practical Proposals: Ethical Housecleaning and a New Shield

Faced with judicial insensitivity<sup>450</sup> to the challenges they face collecting information on the public's behalf,<sup>451</sup> how are working journalists to respond? When confronted with a subpoena, those who hold high their ethics and what they perceive to be their duty under the United States Constitution must choose between breaking their moral code or breaking the law.<sup>452</sup>

Neither the First Amendment to the United States Constitution<sup>453</sup>

447. KLAIDMAN & BEAUCHAMP, *supra* note 54, at 163; Blasi, *supra* note 48, at 266; see Monk, *supra* note 50, at 53.

448. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966), where the Supreme Court observed: The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

*Id.*

449. *Landmark Communications*, 435 U.S. at 839 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)):

A responsible press has always been regarded as the handmaiden of effective judicial administration . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

*Id.*

450. *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Stewart, J., dissenting).

451. Professors Gillmor and Barron have colorfully described the situation as "guerilla warfare" between government and the news media. DONALD M. GILLMOR & JEROME A. BARRON, *MASS COMMUNICATION LAW* 485 (2d ed. 1974). Indicative of some journalists' feelings about the courts are the comments of Sidney Zion:

The question now before the house is whether the news media, having been gouged, kneed, thumbled and finally pummeled to the canvas by the United States Supreme Court, will at least recognize that they are in a fight to the finish with a passel of judicial thugs who intend to keep them cowering in the corner.

Sidney Zion, *How the Supreme Court Zaps the Press*, NEW YORK, June 19, 1978, at 10-11, quoted in *RIVERS ET AL.*, *supra* note 7, at 56.

452. *Branzburg*, 408 U.S. at 732 (Stewart, J., dissenting); see *RIVERS ET AL.*, *supra* note 7, at 201-02.

453. *Branzburg*, 408 U.S. at 690.

nor article I, section 2(b) of the California Constitution<sup>454</sup> offers journalists absolute protection. The courts disagree as to whether qualified First Amendment newsgathering privilege exists, and if so, when it applies and what factors are to be weighed.<sup>455</sup> This debate has caused confusion among journalists<sup>456</sup> and has made it difficult to draft professional guidelines that comply with the law.<sup>457</sup> It is nigh impossible for a journalist and source making a pact of confidentiality to know whether a subpoena will be forthcoming.<sup>458</sup>

The problem is particularly acute in California, where different rules now apply in defamation suits,<sup>459</sup> in civil litigation in which the journalist is not a party,<sup>460</sup> in criminal cases in which the subpoena is issued by the defendant,<sup>461</sup> and in criminal cases in which the subpoena is issued by the prosecution.<sup>462</sup> When courts seek to balance a litigant's interest against that of a journalist, the results are unpredictable.<sup>463</sup> This inevitably chills

454. *Delaney v. Superior Court*, 50 Cal. 3d 785, 805, 789 P.2d 934, 946, 268 Cal. Rptr. 753, 765 (1990).

455. See John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 58 COLUM. HUM. RTS. L. REV. 57, 61 (1985) ("[T]he case law in the aftermath of *Branzburg* has thus far failed to provide clear and consistent guidelines for editors and reporters forced to choose between disclosure and possible incarceration.").

456. Achal Mehra, *Newsmen's Privilege: An Empirical Study*, 59 JOURNALISM Q. 560, 560 (1982).

457. See *id.* at 561.

458. *Branzburg*, 408 U.S. at 731 (Stewart, J., dissenting).

459. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984); *supra* notes 191-208 and accompanying text. See also *supra* notes 117-34 and accompanying text for a discussion of qualified First Amendment privilege.

460. See *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990). See also *supra* notes 209-31 and accompanying text for a discussion of absolute immunity under the California shield law.

461. See *Delaney*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 735 (1990). See also *supra* notes 327-76 and accompanying text for a discussion of qualified immunity under the California shield law.

462. The California Supreme Court limited its discussion in *Delaney* to the competing rights of a criminal defendant and journalists, and did not address the issue of whether a prosecution subpoena should cause a court to similarly engage in a balancing test. *Delaney*, 50 Cal. 3d at 816 n.34, 789 P.2d at 954 n.34, 268 Cal. Rptr. at 773 n.34. Arguably, the shield's absolute language would protect a journalist from a prosecutor's subpoena because the prosecution holds no constitutional right to a fair trial. See *Zicarelli v. Deitz*, 633 F.2d 312, 329 (3d Cir. 1980) (Gibbons, J., dissenting). However, the *Delaney* court implied that the shield law might become qualified if a prosecutor can offer "a constitutional interest sufficient to require the disclosure of information otherwise protected by the shield law." *Delaney*, 50 Cal. 3d at 816 n.34, 789 P.2d at 954 n.34, 268 Cal. Rptr. at 773 n.34.

463. Recent use of punitive measures other than contempt, in order to avoid the shield law's protection of nonparty journalists, are likely to further complicate the issue. See *supra* notes 377-92 and accompanying text.

the flow of information.<sup>464</sup> As one court observed, "unless the declarant has faith that the recipient will preserve the confidence, he will not bestow it."<sup>465</sup>

Nevertheless, promises of confidentiality permeate the process of gathering and disseminating news.<sup>466</sup> Given the very limited circumstances in which a journalist can guarantee that a promise lawfully can be kept—civil actions in which the reporter is not a party, in states with absolute statutory privileges<sup>467</sup>—these agreements must involve naive sources. Journalists who make promises must be similarly uninformed.<sup>468</sup> If they *are* aware of the legal risks, they must be consciously playing Russian roulette with the possibility of going to jail<sup>469</sup> or intentionally misleading their sources with promises they have no intention of keeping.

Whatever one's conclusions about the motivations of promise-making journalists, agreements of confidentiality are being made indiscriminately and without adequate internal controls.<sup>470</sup> This in turn un-

464. Osborn, *supra* note 455, at 75. While this effect is logical, it cannot be proven empirically. As one newspaper editor observed: "The most chilling aspect of the spectre of disclosure is that you are not always sure it's happening. . . . The real loss is the source who never calls, the tips and stories that go unnoticed because the originator of the lead got scared off." *Id.*

465. *United States v. Criden*, 633 F.2d 346, 355-56 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

466. One study determined that 33% of newspaper stories include quotes from unnamed sources. Hugh M. Culbertson, *Veiled Attribution—An Element of Style?*, 55 JOURNALISM Q. 456, 465 (1978). Another study found that 55% of network news reports relied on anonymous sources. K. Tim Wulfemeyer & Lori L. McFadden, *Anonymous Attribution in Network News*, 63 JOURNALISM Q. 468, 471 (1986). In *Time* and *Newsweek* newsmagazines, 80% of the stories contained anonymous attribution, despite a *Newsweek* policy that discouraged the practice and admonished staff members that the use of unnamed sources hurt the magazine's credibility. Wulfemeyer, *supra* note 443, at 85-86.

467. There can be no dispute that the First Amendment, post-*Branzburg*, provides at most a qualified privilege that can be overcome. See *supra* notes 92-134 and accompanying text. Even if *Branzburg* is limited to the criminal context, *Herbert v. Lando* makes clear that a claim of privilege by a defamation defendant must yield to the plaintiff's demand for evidence necessary to prove a critical element of the cause of action. 441 U.S. 153, 175 (1979). While *Branzburg* allows the states to enact shield laws, a generalized assertion of privilege must yield to a criminal defendant's constitutionally protected right to the production of relevant, specific and necessary evidence. *United States v. Nixon*, 418 U.S. 683, 713 (1974). State statutes facially offering absolute protection to newsgatherers who withhold evidence can therefore provide unqualified privilege only in civil litigation in which the journalist is not a defendant.

468. Professor Blasi found in his 1971 survey that journalists' ignorance about shield laws was "remarkable." Blasi, *supra* note 48, at 275.

469. See *id.* at 276-77. "Reporters admitted . . . that their promises to sources to go to jail if necessary to protect confidences are premised on the firm belief that it will never come to that and that, even if it did, the sentence would be minimal." *Id.* at 277.

470. See *supra* notes 52-56 & 58 and accompanying text.

dermines the legitimate use of unnamed sources<sup>471</sup> and justifies judicial skepticism.<sup>472</sup> In fact, it was the broad scope of the shield law, protecting both confidential and nonconfidential sources and information, that caused the *Delaney* court to include confidentiality as a factor in its balancing test.<sup>473</sup> The news media cannot expect the courts to recognize an evidentiary privilege that is too sweeping and easily abused.<sup>474</sup>

If promises of confidentiality are crucial to newsgathering, the journalism profession must persuade the courts that protection of these promises is deserved.<sup>475</sup> Journalists should draft a uniform ethical standard<sup>476</sup> limiting the circumstances under which agreements of confidentiality may be made, and defining under what circumstances these agreements end. Because of the direct threat to the flow of information, the policies supporting a First Amendment privilege most persuasively apply to situations in which important information would be withheld by sources who fear exposure absent a commitment of secrecy.<sup>477</sup> Under this reasoning, the need for a privilege<sup>478</sup> diminishes where there is no promise of confidentiality,<sup>479</sup> or if the need for continued confidentiality has ended.<sup>480</sup>

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471. Wulfemeyer & McFadden, *supra* note 466, at 468, 473.

472. For example, in *Bruno & Stillman v. Globe Newspaper Co.*, the First Circuit was troubled by a reporter's informal and often unilateral method of categorizing information as "confidential" or "nonconfidential." 633 F.2d 583, 594 (1st Cir. 1980). In such situations, the court observed, a judge "must assess the extent to which there is a need for confidentiality. Not all information as to sources is equally deserving of confidentiality. . . . [Promises can] range from the cavalierly volunteered to the carefully bargained-for undertaking." *Id.* at 597 (emphasis added).

473. *Delaney*, 50 Cal. 3d at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768.

474. See STRENTZ, *supra* note 84, at 100.

475. The creation of an evidentiary privilege is improper unless it "promotes sufficiently important interests to outweigh the need for probative evidence." *Trammel v. United States*, 445 U.S. 40, 51 (1980).

476. The need for consistency has been long recognized by the news media. See Blasi, *supra* note 48, at 258. Professor Monk has argued that eliminating a newsgatherer's privilege would penalize "thorough, probing" journalists, but internal ethical standards would "drastically reduce the inappropriate use of confidential sources" without hampering conscientious reporters using confidential sources to collect important information. Monk, *supra* note 50, at 8-9.

477. *Criden*, 633 F.2d at 360-61 (Rambo, J., concurring).

478. See *id.* at 356 ("The rule follows where its reason leads; where the reason stops, there stops the rule."). This precept was adopted by the United States Supreme Court in the context of a qualified privilege protecting the identities of government informers: "[O]nce the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

479. See *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988) ("[N]o authoritative sources demonstrat[e] or explain[] how any chilling effect could result from the disclosure of statements made for publication without any expectation of confidentiality.").

480. See *Criden*, 633 F.2d at 360-61 (Rambo, J., concurring).

The great variety of state shield laws and the absence of a federal statutory privilege have caused the nation's courts to craft an assortment of bewildering and unpredictable balancing tests. Journalists should adopt an ethical code responsive to the needs of libel plaintiffs and criminal defendants for information. They then should draft a uniform statute or constitutional provision that offers *absolute* protection for information gained under a promise of confidentiality.<sup>481</sup> If confidential information is sought in a defamation action in which the plaintiff must prove actual malice,<sup>482</sup> or by a defendant in a criminal action,<sup>483</sup> the privilege would become *qualified*. In such cases, a court could order disclosure only after the party seeking the information makes a clear and specific showing that the evidence is (1) highly material and relevant, (2) crucial to the party's claim, and (3) not available from an alternative source.<sup>484</sup>

Likewise, the First Amendment interest in protecting press autonomy justifies qualified privilege for work product and other information not gained under a promise of confidentiality. The same three factors would veil newsgathering materials and internal decision-making processes of news organizations in all but the most pressing circumstances.<sup>485</sup> Such a rule would protect the exchange of information under circumstances that are not expressly confidential, but under which the journalist feels ethically compelled to withhold to protect sensitive relationships with sources.<sup>486</sup> At the same time, creating a qualified privilege would relieve journalists of the perceived, but unnecessary, duty to protect *all* unpublished information, even in the most innocuous circumstances.<sup>487</sup> While existing professional codes of ethics forbid the

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481. The constitutional provision should not be limited to proceedings in which the journalist is threatened with contempt because the courts would be left to formulate a balancing test for defamation actions, as the California Supreme Court did in *Mitchell*, possibly resulting in inconsistent rules. See *Mitchell*, 37 Cal. 3d at 279, 690 P.2d at 632, 208 Cal. Rptr. at 159. Litigants and courts also would continue to seek ways to impose other punitive measures that fall outside the contempt power. See *supra* notes 377-92 and accompanying text for a discussion of recent such attempts.

The shield law should remain in the California Constitution to avoid the inherent weaknesses of a statute, such as those identified by courts before 1980. See *supra* notes 243-57 and accompanying text for discussions of the *Farr* and *Rosato* cases. As a constitutional provision, the privilege would have to yield only to a competing state or federal constitutional right. See *New York Times Co.*, 51 Cal. 3d at 461-62, 796 P.2d at 816, 273 Cal. Rptr. at 103.

482. See *supra* notes 63 & 123 and accompanying text.

483. See *supra* notes 334-42 and accompanying text.

484. This three-prong test, rooted in qualified First Amendment privilege, has been incorporated into some state shield laws. See, e.g., N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1991).

485. See, e.g., *id.*

486. See *supra* notes 354-55 and accompanying text.

487. Even though the California Supreme Court adopted a too-easily overcome balancing

violation of promises of confidentiality, they do not require journalists to defy the courts and reject their duty as citizens simply because the information in their possession comes within the scope of an expansive shield law such as article I, section 2(b) of the California Constitution.<sup>488</sup>

### C. *Newsgathering Under Current Law*

Absent statutory change, California journalists may choose to assert the qualified First Amendment privilege recognized in the federal courts,<sup>489</sup> rather than the post-*Delaney v. Superior Court*<sup>490</sup> shield law.<sup>491</sup> At first glance, First Amendment privilege appears to offer journalists greater protection: it allows them to withhold information absent a showing that it goes to the heart of the litigant's claim and is unavailable from other sources. In recognizing such a privilege independent of the shield law,<sup>492</sup> the California Supreme Court appeared to limit the protection to *civil* proceedings and *confidential* sources and information, however.<sup>493</sup> Similarly, while a majority of federal circuits recognize the privilege, the courts disagree as to whether it applies to criminal subpoenas and nonconfidential information.<sup>494</sup> The situation is particularly unclear in the Ninth Circuit.<sup>495</sup>

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test in *Delaney*, its observations about the relative merit of the *Los Angeles Times* journalists' absolutist position are instructive:

*Delaney's* personal liberty is at stake. The reporters are not being asked to breach a confidence or to disclose sensitive information that would in any way even remotely restrict their news-gathering ability. All that is being required of them is to accept the civic responsibility imposed on all persons who witness alleged criminal conduct.

*Delaney*, 50 Cal. 3d at 816, 789 P.2d at 934, 268 Cal. Rptr. at 772.

488. See *supra* notes 301-26 and accompanying text.

489. See *supra* notes 117-34 and accompanying text.

490. 50 Cal. 3d 785, 811, 789 P.2d 934, 950, 268 Cal. Rptr. 753, 769 (1990).

491. The availability of this federal constitutional protection even in proceedings falling within the scope of the shield law was noted by Justice Mosk in *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 469, 796 P.2d 811, 821, 273 Cal. Rptr. 98, 108 (1990) (Mosk, J., dissenting).

492. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984).

493. *Id.* at 279, 690 P.2d at 632, 208 Cal. Rptr. at 159.

494. See *supra* notes 129-34 and accompanying text.

495. "The Ninth Circuit has generally compelled testimony by reporters but has given some recognition to a balancing test." Goodale & Moodhe, *supra* note 13, at 650. The circuit court rejected a claim of privilege in the face of a grand jury subpoena. *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975). It also denied a habeas corpus petition by Bill Farr, who refused to cooperate with a court inquiry, see *supra* notes 246-50 and accompanying text, after engaging in a vague balancing test weighing "the claimed First Amendment privilege and the opposing need for disclosure . . . in light of the surrounding facts." *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The *Farr* court did not explicitly rely on any of the three factors used in other circuits. See *id.* at 469.

District courts in the Ninth Circuit have regularly employed the three-prong test (materiality, crucial to the claim, and no alternative sources), but the results have not been favorable



Reporters, editors, publishers and broadcasters should recognize the limited protection offered by current state and federal law and the resulting unreliability of their promises of confidentiality.<sup>496</sup> The ideal, of course, is full disclosure of sources in the normal course of reporting the news, and exceptions should be rare.<sup>497</sup> With each confidentiality agreement a journalist makes, he or she should evaluate whether the information gained is worth a stint in jail.<sup>498</sup> A promise of confidentiality is a sacred trust<sup>499</sup> that simultaneously puts the source at risk<sup>500</sup> and potentially commits the journalist to subordinate his duties as a law-abiding citizen to his role as an ethical newsgatherer.<sup>501</sup>

The decision is a moral one, rather than a legal one. Even if a journalist is permitted by the courts to withhold information, the decision to retain evidence that could alter the outcome of litigation is one he or she must live with for years to come.<sup>502</sup> Alone, the *ability* to lawfully with-

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for journalists. See *Dillon v. City of San Francisco*, 748 F. Supp. 722, 726-27 (N.D. Cal. 1990) (holding that television cameraman must testify in civil suit about eyewitness observations); *Newton v. National Broadcasting Co.*, 109 F.R.D. 522, 527 (D. Nev. 1985) (holding that under First Amendment, defendant journalists must identify confidential sources in libel suit, but Nevada shield law bars disclosure); *Laxalt v. McClatchy*, 622 F. Supp. 737, 749 (D. Nev. 1985) (holding that newspaper reporters must identify confidential sources in libel suit); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 886 (D. Haw. 1981) (same). But see *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981) (holding that nonparty newspaper reporters could not be compelled to disclose confidential information in civil suit because it was not crucial to claim and alternative sources were not exhausted; reporters also protected under California shield law).

496. GILLMOR ET AL., *supra* note 78, at 393-94. "Reporters who assume that their promises of confidentiality are protected by the First Amendment or by statute are taking a great risk." *Id.* at 393.

497. RIVERS ET AL., *supra* note 7, at 200.

498. See EDMUND B. LAMBETH, *COMMITTED JOURNALISM: AN ETHIC FOR THE PROFESSION* 144 (1986).

499. Foreman, *supra* note 50, at 216.

500. *Id.*

501. See KLAIDMAN & BEAUCHAMP, *supra* note 54, at 10-11. One commentator has urged journalists to develop a professional standard for when a newsgatherer should place ethical standards above the law. See James M. Fischer, *Confidentiality and the Press: Tales of the Confessional*, 55 CAL. ST. B.J. 26, 29 (1980). The news media lose court battles and public support by seeking "the widest possible scope of protection, whether or not its legitimate interests are affected by disclosure." *Id.* Therefore, journalists should avoid confrontations over subpoenas and assert a privilege only when the reasons for the privilege are "directly at stake." *Id.*

502. See KLAIDMAN & BEAUCHAMP, *supra* note 54, at 11, 163-73 for a discussion of the moral balancing required in making and keeping confidentiality agreements. According to the authors, "[b]oth the objectives of journalism and the public interest will be served if journalists learn to weigh and balance competing moral considerations in their work, rather than leaving such balancing to the courts or leaving it aside completely as if it were a purely legal matter." *Id.* at 11.

Under this view, any promise of confidentiality must be conditional, leaving journalists a

hold information does not justify glib promises of confidentiality<sup>503</sup> in order to gain tangential information<sup>504</sup> or beat the competition to the story.<sup>505</sup> Rather, a promise of confidentiality should be a last resort, made to protect a source in physical or economic jeopardy and necessary to collect information vital to a story that helps readers or listeners make decisions about government or their community.<sup>506</sup> When the promise is made, the reporter must inform the source (1) that courts often abrogate such agreements and (2) whether the reporter<sup>507</sup> intends to obey<sup>508</sup> or defy any court order requiring disclosure.

Legislative or judicial moves to create and enforce an absolute privilege or a consistently interpreted and enforced qualified privilege are unlikely. Without them, journalists should act responsibly to limit confidentiality agreements to the most pressing circumstances. Doing so may increase the prospects that a court will respect a reporter's promise in the face of conflicting rights.

## VII. CONCLUSION

Although abused through overuse, promises of confidentiality are necessary for effective newsgathering by journalists fulfilling their role as watchdogs over the powerful in American society. Absent a compelling need for the information, courts should respect journalists' necessary confidential relationships. Failure to do so infringes on the First Amend-

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moral escape hatch that allows them to break the agreements when they believe it is appropriate, such as when a source misleads the reporter. *Id.* at 166. A reporter must inform sources of "the rules of the game . . . All a reporter can guarantee is that a promise of confidentiality will be broken only for morally overriding reasons that are extraordinarily compelling. . . . Even if a few sources evaporate, journalism as we know it will survive." *Id.* at 165.

503. See GILLMOR ET AL., *supra* note 78, at 394; KLAIDMAN & BEAUCHAMP, *supra* note 54, at 11.

504. See Foreman, *supra* note 50, at 218.

505. See LAMBETH, *supra* note 498, at 109-10.

506. Foreman, *supra* note 50, at 217-19; see STRENTZ, *supra* note 84, at 98, 104. Before agreeing to keep a source confidential, a reporter must always ask, "Is the news source seeking anonymity to avoid retribution or to avoid responsibility? Is the information of such a crucial nature to the story and to the news audience that the reporter would be irresponsible *not* to provide anonymity?" STRENTZ, *supra* note 84, at 98 (emphasis in original).

507. Some news organizations consider a promise of confidentiality as belonging to the organization, and it is therefore the organization's decision whether to retain or disclose the confidence. Cunningham, *supra* note 58, at 6. This deprives the employee journalist of the ability to independently make and keep moral commitments. *Id.* at 7-8.

508. Such a promise of "conditional confidentiality" is proposed in LAMBETH, *supra* note 498, at 142-43. See also *supra* note 57 for a description of one newspaper's policy of obeying court orders to disclose "anonymous" sources, while refusing to disclose "confidential" sources under any circumstances.

ment by reducing the free flow of information and compromising the independence of the press.

An inconsistently applied qualified privilege subverts the very purpose of the privilege, for sources' doubts about the protection discourages the making of promises of confidentiality and, in turn, chills information-gathering by the news media. The more easily overcome the privilege, the greater the violation of the First Amendment. In contrast, recognition of an absolute privilege gives journalists, as surrogates for the public, the ability to carry out their First Amendment obligations to scrutinize government and other centers of societal power and provide a forum for informed debate on public issues.

*Delaney v. Superior Court*<sup>509</sup> grafted onto an otherwise absolute immunity from contempt a balancing test easily passed by criminal defendants. The decision runs counter to First Amendment principles, constitutional jurisprudence, and the will of the people. Likewise, the immunity's availability only in contempt proceedings has caused courts to employ a different balancing test or deny protection altogether when journalists face other sanctions. A state constitutional privilege that is available in all procedural situations must be enacted in order to eliminate the guesswork of multiple tests with unpredictable results.

The journalism profession must justify such protection, however, by limiting promises of confidentiality to situations of necessity and by disclosing nonconfidential information when it is crucial to a litigant's claim and unavailable elsewhere. By undertaking a moral analysis when the promises are made, and not just when they must be kept, journalists will enter into fewer confidential relationships—but they will be relationships courts are more likely to respect.

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509. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

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